22 How 119.
20 " 227 Co. vs Burr.
19 " 22. Thorn vs Howes
Ch 52 Comm.
1 Pace — Fulton

SUPREME COURT OF THE UNITED STATES.

No. ~~156.~~ ~~78.~~ 38.

LISSAC H. SIMPSON, CLAIMANT OF THE SHIP POTOMAC, HER TACKLE, &c., APPELLANT,

vs.

ELISHA BAKER.

APPEAL FROM THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF NEW YORK.

GEO. S. GIDEON, printer, 511 Ninth street, Washington, D. C.

SUPREME COURT OF THE UNITED STATES.

No. 156.

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UNITED STATES OF AMERICA,
Southern District of New York, ss:

[SEAL.] I, Kenneth G. White, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the writings annexed to this certificate are true copies of their respective originals, on file and remaining of record in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this thirtieth day of November, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the said United States the eighty-fourth.

KENNETH G. WHITE, *Clerk.*

1855, Nov. 23d. The libellant files his libel in the words and figures following, to wit:

To the honorable Samuel R. Betts, judge of the district court of the United States for the southern district of New York:

The libel and complaint of Elisha Baker, of the city of New York, ship carpenter, against the ship Potomac, her tackle, &c., in a cause of contract, civil and maritime, alleges as follows:

First. That this is an action founded upon contract, civil and maritime, and the said vessel is now within this district.

Second. That in the months of September and October, A. D. 1855, the said ship Potomac, then being in the port of New York, and standing in need of certain repairs, supplies, and carpenter's work, the libellant, at the request of the master, owner, agent, or consignee of said vessel, did furnish to and for the use of said vessel certain work, labor, and materials, which, at the usual and fair rates of compensation therefor, amounted in value to the sum of three thousand eight hundred and sixty-seven dollars and ninety-nine cents or thereabouts.

Third. That all of said work, labor, and materials were necessary to the said ship, without which she could not safely proceed to sea and earn freight and passage money, and the same were furnished on the credit of said vessel, as well as that of the master and owners thereof, and the libellant is entitled to a lien upon the said vessel therefor, a specification whereof has been duly filed.

Fourth. That the said vessel is now within this port, which she has not left since the furnishing of said supplies and repairs, and the whole of the value of said repairs and supplies is due from the said vessel, her master and owners, unto this libellant, the said

owners, though often requested, having wholly neglected and refused to pay the same.

Fifth. That all and singular the premises are true, and within the jurisdiction of this court.

Wherefore the libellant prays that process, in due form of law, may issue against said vessel, her tackle, &c., and that all persons claiming an interest therein may be cited to appear and answer upon oath all and singular the premises, and that the said vessel may be condemned and sold to satisfy the libellant's claim, with interest and costs, and that the libellant may have such other relief as to the court shall seem meet.

ELISHA BAKER.

Sworn to before me this 23d day of November, 1855.

JOSEPH BRIDGHAM,
U. S. Com'r.

BENEDICT, SCOVILLE & BENEDICT,
Proctors.

E. C. BENEDICT,
Advocate.

[Endorsed.] 13.144. U. S. District Court. Elisha Baker vs. the ship Potomac, &c. Libel. Benedict, Scoville & Benedict, proctors. E. C. Benedict, advocate. Filed Nov. 23, 1855.

DISTRICT COURT OF THE UNITED STATES,
For the Southern District of New York.

Filed the 23d day of November, 1855.

Stipulation for libellant's costs, entered into pursuant to the rules and practice of this court.

Whereas a libel was filed in this court, on the 23d day of November, in the year of our Lord one thousand eight hundred and fifty-five, by Elisha Baker against the ship Potomac, her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that the said ship, her tackle, &c., may be condemned and sold to pay the demands of the libellant; and the said libellant and Augustus R. Lane, surety parties hereto, hereby consenting and agreeing, that in case of default or contumacy on the part of the libellant or his surety, execution may issue against their goods, chattels, and lands, for the sum of two hundred and fifty dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is bound in the sum of two hundred and fifty dollars, conditioned that the libellant above named shall appear and answer to the cause, and to interrogatories, and shall pay all such

costs as shall be awarded against him by this court, or in case of appeal, by the appellate court.

ELISHA BAKER,
AUGUSTUS R. LANE.

Taken and acknowledged, this 23d day of November, 1855, before me.

JOSEPH BRIDGHAM,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Augustus R. Lane, party to the above stipulation, being duly sworn, doth depose and say that he resides in the city of New York, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

AUGUSTUS R. LANE.

Sworn to, this 23d day of November, 1855, before me.

JOSEPH BRIDGHAM,
U. S. Commissioner.

Recorded the 23d day of November, 1855.

G. T. B., *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

[SEAL.] The President of the United States of America to the marshal of the southern district of New York, greeting:

Whereas, a libel hath been filed in the district court of the United States, for the southern district of New York, on the 23d day of November, in the year of our Lord one thousand eight hundred and fifty-five, by Elisha Baker against the ship Potomac, her tackle, &c., (supplies $3,867 99,) for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said ship or vessel, her tackle, &c., may be cited in general and special, to answer the premises, and all proceedings being had that the said ship or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are therefore hereby commanded to attach the said ship or vessel, her tackle, &c., and to detain the same in your custody, until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the southern district of New York, on the 11th day of December next, at eleven o'clock in

the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness, the honorable Samuel R. Betts, judge of the said court, at the city of New York, in the southern district of New York, this 23d day of November, in the year of our Lord one thousand eight hundred and fifty-five, and of our independence the eightieth.

GEO. F. BETTS, *Clerk*.

BENEDICT, SCOVILLE & BENEDICT,
Proctors for Libellant.

[Endorsed:] Vol. 13, page 144. Southern district of New York. United States district court. Elisha Baker vs. the ship Potomac, her tackle, &c. Monition ret'ble 11 Dec., 1855. Benedict, Scoville and Benedict, proctors for libellant. Filed Dec. 11, 1855. I hereby depute B. F. Byer to execute the within process. Dated Nov. 23, 1855. Abm. T. Hillyer, U. S. marshal.

In obedience to the within monition, I attached the ship Potomac therein described on the 23d day of November, 1855, and have given due notice to all persons claiming the same, that this court will, on the 11th day of December instant, (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter,) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

ABM. T. HILLYER,
U. S. Marshal.

Dated 11th December, 1855.

At a stated term of the district court of the United States of America, for the southern district of New York, in the second circuit, held at the City Hall, in the City of New York, on Tuesday, the 11th day of December, in the year of our Lord one thousand eight hundred and fifty-five:

Present, the honorable Sam'l R. Betts, district judge—

ELISHA BAKER
vs.
THE SHIP POTOMAC, her tackle, &c. } Vol. 13, page 144.

The marshal having returned on the monition issued in the above entitled cause, that he had attached the ship Potomac, her tackle, &c., and had given notice—

Messrs. Beebe & Donohue appear on the part of the claimant,

and, on their motion, it is ordered that the claimant have fifteen days' time to file and perfect his answer.

On motion of Messrs. Benedict, Burr & Benedict, proctors for the libellant, ordered default *nisi*.

[Endorsed:] Vol. 13, No. 144. U. S. dist. court for the s'n dist. of N. Y. Elisha Baker vs. the ship Potomac, her tackle, &c. Benedict, Burr & Benedict, prs. for libt. Beebe & Donohue for clmt. Order of app'ee of clmt., and time to answer, &c. Filed the 11th day of Dec'r, 1855.

At a stated term of the district court of the United States of America, for the southern district of New York, in the second circuit, held at the City Hall, in the city of New York, on Monday, the 26th day of November, in the year of our Lord one thousand eight hundred and fifty-five:

Present, the honorable Sam'l R. Betts, dist. judge—

THE SHIP POTOMAC, her tackle, &c.
vs.
ELISHA BAKER.
} Vol. 13, page 144.

And now Solomon L. Simpson, intervening for the interest of Lissach H. Simpson, owner of the ship Potomac, as agent for the said owner, appears before the hon. court, and makes claim to the said ship Potomac, as the same are attached by the marshal, under process of this court, at the instance of Elisha Baker; and the said Solomon L. Simpson avers that he was in possession of the said ship as agent for the owner at the time of the attachment thereof, and that the person above named is the true and bona fide owner of the said ship Potomac, and that no other person is the owner thereof; and the said Lissach H. Simpson is the true and lawful bailee thereof as owner; wherefore he prays to defend accordingly.

SOLOMON L. SIMPSON,
Agt. for LISSACH H. SIMPSON.
BEEBE & DONOHUE,
Prs. for Clmt.

Sworn to and subscribed this 26th day of November, A. D. 1855.
GEO. W. MORTON,
U. S. Com'r.

[Endorsed:] Vol. 13, No. 144. U. S. dist. co't for the s'n dist. of N. Y. The ship Potomac, her tackle, &c., ads. Elisha Baker. Beebe & Donohue, p'rs for clmt. Claim of Solomon L. Simpson for L. H. Simpson. Filed the 26th day of Nov., 1855.

Respondent's Costs.

DISTRICT COURT OF THE UNITED STATES,
For the Southern District of New York.

Filed the 26th day of Nov., 1855.

Stipulation entered into pursuant to the rules and practice of this Court.

Whereas a libel was filed in this court, on the 23d day of Nov., in the year of our Lord one thousand eight hundred and fifty-five, by Elisha Baker against the ship Potomac, her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that said ship may be condemned and sold to pay the demands of the libellant, and the parties hereto hereby consenting, that in case of default or contumacy on the part of the clmt. or his surety, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands:

And whereas, also, a claim has been filed in said cause by Lissach H. Simpson: Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby bound in the sum of two hundred and fifty dollars, conditioned that the clmt. above named shall pay all costs and expenses which shall be awarded against him by the final decree of this court, or upon an appeal, by the appellate court.

LISSACH H. SIMPSON,
By SOLOMON L. SIMPSON,
P. Atty.

ABM. C. BELL.

Taken and acknowledged this 26th day of Nov., 1855, before me.
GEO. W. NORTON,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Abm. C. Bell, party to the above stipulation, being duly sworn, doth depose and say that he resides in the city of New York, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

ABM. C. BELL.

Sworn to, this 26th day of Nov., 1855, before me.
GEO. W. MORTON,
U. S. Commissioner.

Recorded the 26th day of Nov., 1855.

G. T. B., *Clerk.*

Bond to Marshal. Act of Congress, March 3, 1837.

Vol. 13, page 144.

DISTRICT COURT OF THE UNITED STATES OF AMERICA,
For the Southern District of New York.

Filed the 26th day of Nov., 1855.

Know all men by these presents, that we, Lissach H. Simpson and Abraham C. Bell, are held and firmly bound unto Abraham T. Hillyer, marshal of the United States for the southern district of New York, in the sum of seven thousand seven hundred and thirty-five 98-100 dollars, to be paid to the said Abraham T. Hillyer, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with onr seals, and dated the 26th day of Nov., in the year of our Lord one thousand eight hundred and fifty-five.

Whereas, a libel has been filed in the district court of the United States for the southern district of New York, on the 23d day of Nov., in the year of our Lord one thousand eight hundred and fifty-five, by Elisha Baker, libellant, against the ship Potomac, for the sum of 3,867 99-100 dollars, on which process of attachment has issued, and the said ship Potomac is in custody of the marshal under the said attachment, and Lissach H. Simpson has applied for a discharge of said ship Potomac from the custody of the marshal, and has filed a claim claiming the said ship Potomac as owner, and has filed a stipulation for the claimant's costs, pursuant to the rules and practice of the said court: Now, therefore, the condition of this obligation is such, that if the above bounden Lissach H. Simpson shall abide by and perform the decree of this court, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

LISSACH H. SIMPSON,
By SOLOMON L. SIMPSON, [L. S.]
Atty.
ABM. C. BELL. [L. S.]

Sealed and delivered, and taken and acknowledged, this 26th day of Nov., 1855, before me.

GEO. W. MORTON,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Abraham C. Bell, being duly sworn, depose and say, that he resides in the city of New York, and that he is worth the sum of 8,000 dollars, over and above all his just debts and liabilities.

ABM. C. BELL.

Sworn to, this 26th day of Nov., A. D. 1855, before me.
GEO. W. MORTON,
U. S. Commissioner.

I approve of the sufficiency of the sureties to the within bond. Dated this 26th day of Nov., 1855.
SAML. R. BETTS.

Recorded the 26th day of Nov., 1855.
G. T. B., *Clerk.*

At a stated term of the district court of the United States of America, for the southern district of New York, in the second circuit, held at the City Hall, in the city of New York, on Monday, the 26th day of Nov., in the year of our Lord one thousand eight hundred and fifty-five:

Present, the honorable Sam'l R. Betts, dist. judge—

THE SHIP POTOMAC, &c.
ads.
ELISHA BAKER.
} Vol. 13, page 144.

On filing claim and stipulation for clmt.'s costs, together with a bond, under the act of Congress, in double the amount claimed, approved by the district judge, on motion of Beebe & Donohue, proctors for the claimant, it is ordered that a copy of this order be delivered to the marshal.

[Endorsed:] Vol. 13, No. 144. U. S. dist. co't for the s'n dist. of N. Y. The ship Potomac, &c., ads. Elisha Baker. Beebe & Donohue, prs. for clmt. Order to marshal. Filed the 26th day of Nov., 1855.

To the honorable Samuel R. Betts, judge of the district court of the United States for the southern district of New York:

The answer of Lissach H. Simpson to the libel of Elisha Baker against the ship Potomac, her tackle, &c., respectfully shows:

First. That respondents deny the statements in the second article of the libel.

Second. These respondents, further answering, deny the statements in the third article of the libel.

Third. And respondents, further answering, deny the statements set forth in the fourth article of the libel.

Fourth. The respondents, further answering, say that the libellant superintended some work on the said vessel, and provided some materials, but not to the amount stated in the libel; and that the same was to be at much lower prices, and was by agreement not to exceed the sum of

Fifth. That all and singular the premises are true.

Wherefore the respondents pray that the libel herein may be dismissed with costs, or for such relief as may be just.

L. H. SIMPSON.

Sworn to before me this 18th day of February, 1856.

WILLIAM L. MILLEDOLER,
Notary Public.

BEEBE & DONOHUE,
Prs. for Clmts.

BEEBE, *Advocate.*

Endorsed: 13, 144. U. S. dist. court. The ship Potomac, her tackle, &c., ads. Elisha Baker. Answer. Beebe & Donohue, clmt's prs. Filed Feb. 26, 1856. Exceptions submitted to court by consent this 16th Oct., 1858. Benedict, Burr & Benedict, proc. for libt. Beebe, Dean & Donohue, for respt.

U. S. DISTRICT COURT.

ELISHA BAKER
vs.
THE SHIP POTOMAC. } Dec. 11, 1856. Judge Ingersoll.

This cause coming on to be heard in its order on the calendar—Mr. Donohue appearing in behalf of the claimants, and Mr. Benedict in behalf of the libellant—

It is ordered, adjudged, and decreed that the libellant recover of the said ship Potomac, &c., the amount of the materials, supplies, and labor by him furnished and referred to in the libel, if any there were; and that it be referred to a commissioner to ascertain the amount due therefor, and report the sum to the court with all convenient speed.

CHAS. A. INGERSOLL.

Endorsed: U. S. district court. 13, 144. Elisha Baker vs. the ship Potomac, &c. C. L. Benedict for libt. C. Donohue for clmt. Decree for libt., and order of refer'ce. Filed Dec. 12, 1856.

U. S. DISTRICT COURT.

ELISHA BAKER
vs.
THE SHIP POTOMAC. } Benedict, Burr & Benedict, proctors for libellant.
Beebe & Donohue for claimant.

Before C. W. Newton, com'r.

December 13, 1856. Parties appear; and Hewlett J. Norris being produced and sworn, on the part of libellant, says: I reside in the city of Brooklyn, and am in the employ of libellant; am a shipwright, and have been for a great many years. About Oct.,

1855, I was at work on the ship Potomac for E. Baker & Co., repairing her, planking, putting timber into her, planking her on deck; part of a new rudder was put into her. I was on her all the time she was being repaired, with the exception of one or two days, when I was absent through sickness. I can't come to the particular items that was done on her; I did know at the time; I did not keep any account of the work done, except from day to day, which was handed into the clerk, such as wood and iron, spikes, &c.; the account was rendered into the office; the materials as used were taken down on a slate, and from that taken off by the clerk; I can tell from my book the time on her within a few days; Drew took it off from the slate; I am acquainted with the market value of timbers, &c., used on the Potomac at that time.

Q. Look at bill marked Exhibit "A," and say whether the prices charged for materials are the usual and fair prices for such materials at that time?

(Obj. to by claimant's counsel, Mr. Donohue. Reserved.)

I should say, in regard to the carpenter materials, that they were unusually low.

Cross-examined by Mr. Donohue.

I have never carried on business for myself; I do not buy and sell materials for myself; I have carried on work for myself somewhere about 1839 and '40; I did not purchase the materials in the bill; Baker & Co. purchased materials of Wm. Smith & Son—oak and pine, and some they had in the yard, which they used on the Potomac. The treenails, I think, were bought from Sheldon Martin; I can't say all were—some were. I think the spikes were bought of Freeborn—I wont be positive; the copper bolts came also from Freeborn, I think; the rest of the bill I don't recollect where the materials were purchased from; I am foreman of the ship carpenter's department.

HEWLETT J. NORRIS.

Examination adjourned to Dec. 22d, 3 o'c.

Dec. 22d. Parties appear; and Thomas R. O'Brien, being duly sworn, says: I reside in the city, and am a caulker; I remember the Potomac; I *done* caulking on her for Capt. Baker; I was the foreman; I took the time of the men every day, and read them off to Mr. Drew, and he copied it into the book; sometimes I left the paper on the desk, and he copied it into the book in the morning; what became of the papers I don't know; I did not take them away; I should calculate that the work I *done* myself, with my gang of men, would be three hundred days' work—that would be a rough guess; the men received twenty shillings a day, and the usual charge for their labor is twenty-one shillings per day by the employer.

THOS. O'BRIEN.

Adjourned to the 24th, at 3 o'clock, p. m.

Parties appear, and adjourn to the 26th Dec., at 3 o'clock.

Dec. 26th. Parties appear; and James Roxby, being duly sworn, says: I am bookkeeper for Baker & Co.; I was with them when it was McPherson & Baker; I know Edward Drew; I know his handwriting; he was clerk for McPherson & Baker a short time, and was for Baker & Co. since, in Sept., 1855; I recognize Drew's handwriting in the scrap-book here presented in every line; this account of the ship Potomac is in the handwriting of Drew. These items in this book are copied from the slate as the foreman puts it down or gives it in; that is the usual course of business; the items are copied from the slate every day. At this time I was clerk the next door, and I don't think Baker & Co. had any other clerk; if he had any one else, I think I should have known it; Drew is sick.

Q. How is he sick? (Obj. to by claimant's counsel. Reserved.)

A. He is affected in his head in some way.

Q. Have you known bills being settled from that book?

A. (Obj. to by claimant's counsel.) I have.

The production of the scrap-book objected to by claimant's counsel. Reserved.

The libellant here offers the account of the ship Potomac in the scrap-book.

Examined by claimant's counsel.

I was not present at any time of the entry of the items in the book. There is a day book and time book in Mr. Baker's office; the day book is collected from the scrap book; the time book contains the time of the men. (The production of the book and the account of the Potomac obj. to by claimant's counsel. Reserved.)

Q. Is Drew in a condition to give reliable testimony as to facts? (Obj'd by claimant's counsel. Reserved.)

A. I should think not, from what I saw of him three weeks ago.

Cross-ex. by claimant's counsel.

I am not a medical man; I don't know how long he has been sick; I have been away from New York nine months. I have been away from the city since a year ago last Dec'r.

Direct examination.

I called on him some three weeks ago, and was surprised that he did not know me, as I was so well acquainted before I left. I offered him any services I could render him, and he said he was not able to talk to any one.

Cross.

He came in the room; I don't know what he had been doing.

JAMES ROXBY.

Sworn before me, this 26th day of Dec., 1856.

CHS. W. NEWTON,
U. S. Comm'r.

Augustus R. Lane, being duly sworn, says: I am acquainted with Edward Drew; have known him seven years; he has been sick for some time past—for about two months; I have sat up with him two or three nights; his mind was a good deal out of order; he wanted to know at one time who was getting out of order; he was out of his mind; I sat up with him several nights.

(Claimant's counsel obj. to last evidence.)

Sometimes he would want to know what was there—he would see something before him; he could not recollect from one day to another anything. When I would go in, he would say I had not been in to see him, when I had been in the night before; it was about two or three weeks since I saw him; I don't remember any other facts particularly without my being called on to show that he is out of his mind; he did not appear to have any memory.

Cross-ex. by claimant's counsel.

I have not seen him for three weeks, and don't know how he is now; sometimes he would make motions whilst he was in bed: he is bodily sick, and head, too.

Sworn before me, this 26th day of Dec., 1856.

C. W. NEWTON,
U. S. Com'r.

Hewlett J. Norris, being recalled, on the part of libellant, says: I have a book in which I did keep the entry of the time of the days' work of men on the Potomac. I have examined the book, and find about 560 days' work; I kept all the days' work, except one day, when I was sick.

Cross-ex.

I got at the number of days from the book.

(The book is here produced, and marked Exhibit "B," and leaves it with com'r temporarily.)

The persons' names I got from the book, who worked on the Potomac. The names are as follows: Myself. Martin; he was a carpenter; don't know where he is now; I think his name was William, if it is the one I think it is. Bogert; his name is Henry Bogert; he resides in the city of New York. Townsend; don't remember his first name; I think it is George; he resides in Greenpoint, I think. T. Simmons; don't know his residence. N. Kelly; I recollect two or three by that name; can't say I recollect positively his first name. T. White; I recollect the person; don't know where he resides. W. Gainer; don't know where he lives, and don't know what W. stands for. Crowley; I recollect the person; don't know his

first name, or where he lives. Ryordont; I recollect, I think, the person; don't know his Christian name. Payne; don't know his Christian name, or where he lives; don't recollect the person. Stewart; don't know his Christian name; can't say I recollect the person, or where he resides. Dean Samuel; I recollect the person; don't know his residence. Leek; I don't know his Christian name nor residence. Miller; don't know his Christian name or residence. Sullivan; can't tell Christian name; I can't say I recollect the person; residence don't know. Milligan; Christian name or person don't recollect, or residence. J. Allen; don't recollect his residence, or I can't say I know the person. Southworth; I think his name is James; if it is, I know the person; residence don't know. P. Welsh; don't know the person or residence. J. Clough; don't know person or residence. H. Dougherty; don't recollect the person or residence. P. Welsh; I presume it is another person from the one above named; I don't remember the person or residence. W. Briggs; don't recollect the person or residence. Kirkpatrick; don't know his Christian name; I believe I know the person, not his residence.

H. J. NORRIS.

Adjourned to Wednesday, Dec. 31, 3 o'c.

1857, Jan'y 16. Parties appear, and libellant's counsel calls Edward Drew; being sworn, says: I remember that the Potomac was repaired by Baker; I was his bookkeeper then; the items were given to me of materials, and I put them on the slate, and they were transferred from that by myself to this book, now marked by the com'r "C."

The last evidence objected to by claimant's counsel; overruled.

Q. Look at the account referred to in exhibit C, and state whether that is the original account taken by you from the slate, in the usual course of business in that office, of work and materials furnished the ship Potomac?

(Objected to by Mr. Donohue, on the ground that the account cannot be proved in that way; obj'n overruled.)

A. Yes.

Q. State whether that account is a correct statement of the work and materials used on the ship Potomac, as furnished you by the men.

(Obj'n by Mr. Donohue. Overruled.)

A. It is.

I know Capt. Sweeny; I have seen him up there at the time the work was being done; he was there every day most of the time; he was connected with the Potomac as master and part owner; I don't know whether he ever saw the account; I presume he saw me make some of the entries in the book, for he was frequently in there.

Q. Was Capt. Sweeny ever present when you were transcribing this account into exhibit "C," the book?

(Obj. to by claimant's counsel. Overruled.)

Yes, sir.

Q. Did Capt. Sweeny ever make any objection, if any, to any of the items charged in that account?

(Obj. by claimant's counsel. Overruled.)

A. He did not. A copy of the account was furnished to Capt. Sweeny; he made no objection to it.

Q. What did Sweeny say about the account?

A. He made no objection about the account, but said he would take it to Mr. Simpson's office.

Q. State what articles in the account you know of your own knowledge to have been furnished to the ship by the libellant.

A. The first item, oakum pitch, mops, oakum, and spikes; I weighed most of the spikes, and saw them going from the office to the ship in the yard; the treenails I ordered. Nails, truckage, wedges, composition spikes; I gave an order on our pass-book to Freeborn & Co. for the composition spikes, and when they came back they passed through my hands. Copper bolts, plugs, oil, spun cotton, topsail yard, top gallant staysail, booms, oak knees, topmast, pitch and tar, tacks, main yard, top-gallant yard; watchman, the money paid *them;* composition rings, candles, tree-nail wedges, felt, sheet lead, composition saucer for rudder, spruce plank, spars for spalls. I was often down at the ship when this work was being done; I have been connected with business of this kind since 1849 in New York.

Q. Were you acquainted with the prices of such services and materials mentioned in the bill?

A. I was.

Q. Are the prices charged in the bill the usual and fair prices charged for like services and materials in bill "A" referred to?

A. They are.

Cross-examined.

The Exhibit A is in my handwriting, and so is the book Exhibit C. I think I left Baker's employ about the 5th November, 1856, and was with him during the times of the repairs of the vessel up to 1856; I was away before the repairs on the vessel for two or three months; from 1849 up to 1856 I had been in Baker's employ, except these times I was away; spikes were worth about ten cents at the time they were furnished; the pitch was worth 20s., mops 3s. to 5s.; oakum was, I think, 10c.; then it varied; oak 5c. per foot; oakum varied considerable; it might have been worth 1s. Locust treenails vary according to length; I can't tell you what was the length of those. Truckages was from different shipyards when we got large timber; white pine was worth 4 cts., choice pieces five cents; wedges 5c.; composition spikes I could

not tell you within a cent or two; I don't recollect their value. Treenail wedges I have forgotten the price of; they were so much a thousand. Copper bolts I can't tell the price of; it is not in my mind now. I do not recollect the size of the spars. I can't remember the quantity of any of the articles sent from any of the shops, or furnished by Mr. Baker. I cannot give you the particular day Capt. Sweeny was in the office when I was making entries in the book, nor any item or items. I recollect of his being in the office from the fact, when the foreman was taking things for other vessels, he would remark, in a joke, why don't you put it down to the Potomac; from that, I suppose he was in the office when I made some of the entries. My recollection has been good, except when I was sick and confined to the house; I was sick from the 1st of Nov. 1856, till nearly this time. If you asked me if my memory was defective, I would answer no, excepting during my illness. I am in no one's employ now; I am very feeble; I am not yet well; I have never talked this over with Baker, whether I recollect this bill, &c.; the question has never been asked me whether I recollected the bill. I have spoken to Mr. Benedict; he asked me if I would come up and be asked some questions; I came up with Mr. Baker. Mr. Baker asked me to come here to-day as a witness; he asked me in his office; I am in the habit of going to his office without his sending for me; I have been in the habit of going to his office every day since I have been able to go there for the past two months; he never asked me whether I recollected about the bill; it is not always usual to give a man a bill; it is always usual to give a man the bill when you get through a job, and it is usual for him to take it and look over it. I know Sweeney was master, and he told me he was part owner; he acted as master, and no one else acted as master; there was a mate, I think, the last of the time, but I can't give his name; there was no crew. Sweeny *done* more than a superintendent would do, for he dictated what should be done and what should not; a superintendent does not do it when the boss is present. Sweeny had no boss; Sweeny did not do any more than a superintendent would do who had no boss.

Re-examined by Mr. Benedict.

Sweeny went to sea as master in the Potomac.

Q. Look at the account in Exhibit C, (book,) and after refreshing your memory, state what portion of the bill charged you recollect to have been furnished the vessel.

A. I can't state the particular quantity of any of the items at the date.

Question repeated. Locust treenails, spars, truckage, all the spars, curtages, rigger's bill, wedges, composition spikes, oakum, copper bolts; I mean all the oakum and all the spikes in the bill; deck plugs; I mean all the nails; spun cotton, oak knees for the head, pitch and tar; I mean all the pitch and tar; punching cop-

per, mops, paid the watchman, composition rings, candles, oak for stern post and rudder stock, felt, sheet lead, composition rudder saucer, all the spruce planking. I know that the days' work are the same as given me.

The witness here corrects himself, and says that he was mistaken. Exhibit "A" is not in his handwriting; he thought it was the original list.

Re-cross-examined.

I cannot give the quantities of any of these materials *with* referring to the books. I have looked over the book not with a great deal of attention. I have gone over the book three times, item by item.

Q. Can you, after examination and refreshing your recollection and recalling the circumstances to your mind, give the quantity, length, or size of any article furnished the vessel?

A. I can't give you the quantity of the spikes, but I can the length, they are ten inches long; the treenails were an inch and an eighth, and of several lengths; the planking on the outside was five inches thick, but the quantity I don't know; I don't recollect anything else.

(The book was not in the witness's hands during his re-cross-examination.)

Sweeny went out in the vessel as master; I know it by his telling me. Sweeny told me, shortly after the Potomac sailed, that he had sailed the Potomac; he told me this three months after the vessel sailed; he told me this in Baker's office; he came into the office to see me; we had been old friends some four or five years. I did not put the prices in this bill or *or* paper Exhibit "A," nor did I put the prices in that bill or paper Exhibit "A;" I did not make that bill; I did not see the bill Exhibit "A" before this afternoon.

Q. Did you see the bill or paper Exhibit "A" before I presented it to you on the cross-examination, so as to recognize the figures on the paper?

A. I don't know whether I did or not.

Q. Then why did you say, in answer to my question on cross-examination, that this was in your handwriting?

A. Because I supposed it was then; I had not looked at it minutely; I cast my eyes over the prices and figures; I can't tell you when I made the remark; the bill was passed to me from Mr. Benedict.

Q. Can you swear that you had looked at this bill "A" before you swore that the prices were usual and fair?

A. I don't know whether I did or not; I supposed it was the original bill, and answered accordingly.

Re-direct examination.

I never heard Sweeny say anything definitively after he took the

bill down to Simpson & Co.; I saw him nearly every day after that at the hotel; I don't remember seeing him at the office after that

EDWARD DREW.

Adjourned to October 16th, at 3 o'c., p. m.

Oct. 16th, 3 o'c., p. m. C. L. Benedict appeared as counsel for libellant; and no one appearing for claimant, he called for a report upon the evidence; thereupon I, this 26th day of October, 1857, do report that there is due the libellant the sum of $3,943 67 for materials, labor, &c., and interest on the same for one year $276 05, being from Oct. 26, 1856, to Oct. 26, 1857, amounting, in all, to $4,220 32.

Adjourned, on motion of claimant's counsel, to Nov. 23d, at 3 o'c., he stipulating to go on and examine witnesses on that day.

Nov. 23d, 3 o'c., p. m. Parties appear; and John Sweeny, being sworn as to his interest, says: this vessel was bought of a man named Stone; there was an arrangement I was to sail her for $100 per month; don't know whether there was any money collected for insurance: I never received any portion of the insurance; I borrowed money from Bell for my own use; don't think I told Bell I borrowed the money for the purpose of purchasing an interest in the vessel; the result of this suit will make no difference in regard to my interest; there was no arrangement I was to have any interest.

John Sweeny sworn on part of claimant

I knew Capt. Drew. Capt. Drew told——

(Obj. to by libellant's counsel.)

Q. Who first applied to you for the job?

A. Mr. Drew. It was mainly through Drew Mr. Baker got the job.

Q. What did Drew say when he came to get the job? (Obj'd to by libellant's counsel. Overruled.)

A. As to say word for word what he said, I can't do it; but the am't of it was, that he solicited the job as a partner of Mr. Baker. Mr. Baker, I understood, was out of town, and I understood that Drew had the power to act as Mr. Baker.

Q. What did Baker say about the partnership with Drew, if anything, or his interest?

(Obj'd by libellant. Overruled.)

A. I can't give what he said; but the impression formed on my mind, from what Baker said, was, that Drew was interested in the concern.

Exhibit No. 1 produced, and admitted, being check for $500, dated Oct. 27, 1855.

I made a verbal arrangement with Capt. Baker in regard to the work. Mr. Botefuhr made an estimate for this work. I saw Baker,

and told him I preferred him to have the job, and told him the estimates had been made. He said that I might rest assured that whatever he *done* would be done right. I said, that wont do, Baker; said I, what will you do this work for? he said, all he wanted of this job was one shilling per day extra from the men employed; $2 50 per day for himself and foreman. A dispute then arose about buying the material. Mr. Baker came to the conclusion I was not posted in buying material, and I had better leave it to him; that he would buy the material, and charge the cost price. Under that agreement I told Mr. Baker to go to work at the ship. I would not be positive whether, on the day the work commenced, or the day after, Mr. Solomon Simpson was standing on the dock by my side, and he made the remark to Mr. Baker that it was more of a job than he first thought it to be. Mr. Baker made the remark that he thought the expense of the job would be in the neighborhood of $1,000. Mr. Simpson appeared to be satisfied there was more work done than Botefuhr estimated for—the additional was a head put on the rudder. I wont be positive about the number of pieces, but there *was* three or four new pieces put in the bow of the ship, and a new main-top-mast, gangway or stage for receiving cargo, &c., side skids. As to small spars, I have lost recollection of; there may have been two or three small spars. I have had experience in getting ships repaired; been acquainted for 17 years; these additionals, in my opinion, would not amount to over $100. I want to state what Baker said; he said that the top-mast would cost above $40; it was to be of Norway pine; as regards the rudder, I hesitated about fixing that; he said it would cost but a trifle, and therefore I had it done. I never saw any of the items from the slate copied into the book by Mr. Drew; I never saw any of the items, or the bill for it, until I saw it in Simpson's office, and I think Baker brought it there. Drew never delivered a bill to me; I asked Drew for a bill previous to going to Simpson's; I never agreed to the correctness of any bill that was furnished for this work; I disagreed to the first one I saw, decidedly; the bills were rendered in the name of Baker & Co.; when I saw the bill at the office, Mr. Simpson handed it to me to examine; as regards the am't of the bill, I can't say; I could not place the same amount of material that is in bill marked Exhibit A; I could not find any such am't as is in the bill as being used on the vessel; I examined the vessel after I saw the bill, and could not find any such amount of materials as is in the bill.

Q. Could you or not tell, from having been there (from your experience) during the work, and examining the vessel afterwards, how much material had been used?

A. I could do it, and measured the new work that was put on the vessel; in making the estimate, I allowed one-half for waste. I measured the new work on the outside of the vessel which was on the outside; I measured the pine and oak together; I found,

by allowing one-half waste, there was, of both oak and pine, 14,308 feet. There was no such number of treenails as is mentioned in the bill; there *was* thirty-seven hundred and some odd, not thirty-eight; I counted every treenail, and chalked them as I passed them; I might have counted some in that ought not to be; I suppose the 4,000 treenail wedges were used. It was understood that the treenails were to be wedged inside and out, and would require two wedges to each treenail. I could not find any such quantity of spikes as in the bill; don't know what they could be used for; I think the copper bolts were used; can't tell about the composition spikes; don't know where they were used. It was understood that she was to be iron-spiked; I saw nothing but iron go into her, except on the rudder; there were a great many boys at work on the vessel; I talked principally with Drew about the work, and anything I wanted to find out, I went to Drew; the foreman referred me to Drew.

Q. What were they—journeymen or apprentices?

A. Mr. Drew told me they were boys, that is, boys that they paid three dollars per week.

(Libellant's counsel objects to what Drew told witness. Obj. overruled.)

There *was* nine boys that I knew of that *was* at work on the ship; I don't think they could do man's work; to the best of my knowledge, they could not do a man's work. When the work was first finished, I considered it as a fair job; you may call it well done; but in loading the ship, I considered the job was not well done.

(Cross-examined.)

The conversation with Baker took place at the head of the ship, on the wharf; I don't know that there was any one present but us two; I think it was in September, 1855; it was between the hours of 9 and 1 o'clock; that was the first time I had any direct conversation with him about it; we had not commenced any work on the ship then; I have stated all the conversation that occurred between me and Mr. Baker there, to the best of my knowledge.

Adjourned to Nov. 25th, 3 o'clock, to continue examination of witness.

Parties appeared Nov. 25th, and, on motion of claimant's counsel, adj. to Nov. 28, 3 o'c.

Nov. 28, parties appear, and, on motion of claimant's counsel, reference adjourned to Dec. 2d, 3 o'c.

Adjourned, by consent of parties, to Dec. 3d, 11 o'c.

Dec. 3d, parties appeared, pursuant to adjournment; and C. L. Benedict, Esq., proceeds with the cross-examination of the witness.

I first saw Baker personally one or two days before the work commenced. I could not say positively whether I did see him one or two days before the work commenced or not. The first time I

personally saw Baker, he talked with me about what repairs the ship would require. I wanted some idea of the expenses of the repairs. Mr. Baker stated that he wanted nothing extra out of the job more than one shilling extra for the men, $2 50 per day for himself, and the usual wages for foreman; we then, during this conversation, had a conversation about the purchasing the materials; I had an idea of purchasing the material myself. Baker persuaded me that he was better posted in purchasing material than myself. I agreed, then, with him that he should buy the material, we paying him the cost of the material, he to present his bills to Mr. Simpson. I then wanted to know what the job would probably cost, including material and labor. Baker's answer to me was, in the neighborhood or vicinity of about $1,000. I then informed Baker that other persons had estimated for the job; but, with the conversation I had with him, that there was no doubt about his having the job; those were my words to him; in fact, I told Baker he might get ready to go to work at it; all that was necessary to make the job positive was, for me to see Mr. Simpson, and give him a statement of the conversation with him; there might have been some other conversation that day, but I don't remember; this conversation was all on the same day; I might have been away half an hour or so on board the ship during the conversation; I have no distinct recollection whether I left during that conversation or not; I might have done so, my duties calling me off. The ship was close by Mr. Baker's office at the time of the conversation; she was in the same berth she was when she was repaired. As regards the time of day this conversation took place, I really can't say; it was between 10 and 4 o'clock. I could not positively say when it took place; but the best of my opinion is, that it was in the forenoon. We first began the conversation in the front of Baker's office, on the sidewalk; very little took place there. I began the conversation there by saying that I was very glad he had arrived from down east, where he had been to; then the general conversation began about repairing the ship; we crossed the street to the front of the ship, and there was where the conversation was wound up; it was on the bulwark we had the conversation; the vessel did not lay at the dock, but fast to a floating dock. I went down town to Simpson's, after the conversation, and back to the ship several times that day. I came back to the ship, and saw Capt. Drew at Baker's office; nothing took place between me and Drew in regard to the ship; it was a general conversation I had with him. I went from seeing Drew to the United States Hotel; don't think I was up to the ship that night again; was not there that night; I might have stopped on my down town, but I fetched up at the United States Hotel. I *see* Baker the next forenoon, where he had some men on the same bulkhead in the street; he was doing some work, I supposed. I then had a general conversation with him about the ship. I believe I wanted the underwriters [to] examine her; that

was a portion of that conversation. Baker said nothing to me at this time in relation to the compensation for the work. Mr. Baker had, previous to this, began to work on the ship. Baker and me might have talked that time half an hour or an hour; I can't tax my memory exactly. I have stated all the conversation that was addressed personally to me at this conversation at the bulkhead, in the forenoon. You stopped me when I was commencing to speak about the underwriters; we got one of the underwriters' inspectors, Capt. Merry, to look at the ship, and bore her. I requested one of Mr. Baker's men to go with me and Capt. Merry into the ship; can't tell whether I requested Mr. Baker or Mr. Drew to leave the man. Mr. Drew was on the side-walk about this time; don't think he joined in the conversation; he might have been near enough to hear it. I got Capt. Merry in the vicinity of the ship, and took the man of Mr. Baker, and proceeded on board of the ship, and went into the lower hold of the ship; bored some ten or fifteen holes into her frame, and took the wood that came out from the auger, showed them to Mr. Baker; previous to showing them to Mr. Baker, Capt. Merry pronounced them good; Baker was in the vicinity when I showed him the borings. Merry made a regular survey, I presume; I requested him to do so. The conversation with Solomon Simpson, which I testified to on my direct examination, I can't positively say when it was, whether before or after I had the survey made. I don't know the name of the man who bored the ship; the ship was not bored on more than one occasion, that I remember. It was between the hour of 8 and 10 o'clock that I went up there, on the morning I had the conversation with Baker, and had the ship bored. I went up directly from the United States Hotel. I might have stopped somewhere on the way; it was directly after breakfast I started up. After Merry went aboard, I went on shore to the bulkhead; don't remember whether Baker went on board with us or not; don't remember of any one going on board with us when the ship was bored, except the man and Merry; I don't think Merry went bock on the bulkhead with me; Merry and I did not examine the upper part of the ship at that time; he gave me his report the same day. Afterwards, when I went back into the bulkhead, I saw Mr. Solomon Simpson; don't know what he was doing; I suppose he came to see about the ship; he was standing looking at the ship. I was about getting off when I saw Mr. Simpson; I don't recollect seeing Mr. Baker then; that was the first time I saw Solomon Simpson at the ship that morning. When I saw Mr. Simpson, he wanted to see Mr. Baker; he wanted to have an understanding about the agreements I have been making, and see whether they were *satisfaction*. Baker came where we were standing at the bulkhead. The conversation then occurred between Baker, Solomon Simpson, and myself—the conversation I referred to the other day, in my direct examination. Mr. Simpson, to the best of my knowledge, began the conversation by wishing to

know from Baker what this job was likely to cost. Baker answered Simpson, to make his mind easy, that the job should not cost over $1,000; that is the am't of the conversation; that is what the conversation led to. I am willing to swear that Baker used those words, that the job should not cost over $1,000. I heard nothing more than, during this conversation, Simpson said he felt contented under those conversations, and that he might go on with the work; he might not have said contented, but willing, which is the same thing. Solomon Simpson was one of the owners of the ship. I never had any more conversation with Baker about the repairs, with exception of extra work that was found necessary to be done after the job was commenced. I never had any conversation with the foreman of Baker about this job, to the best of my knowledge; there was nothing said as to who I should buy materials of, nor who he should buy them of, but he was to buy them [as] cheap as possible. Nothing was said about the blacksmith's work at any time to me, nor by me to Baker; there was no one, except Baker, at the bulkhead *who* I knew when I was there, that were there near that I knew—I mean when I arrived there. Mr. Solomon Simpson was there during the time of the conversation at the bulkhead; he was not there during all the conversation; can't say whether he was there before I went on board with Capt. Merry; I can't recollect whether Simpson came there before Merry went on board, or any of the conversations particularly before that time; had not been down to Simpson's store before I came up; can't say whether I had seen any of the Simpsons before I went up that morning; can't positively say whether I had any conversation with the Simpsons before I went up to the ship that morning. I *see* some of the Simpsons on the day before I went up, in the afternoon; I saw Solomon Simpson, Lissach Simpson, jr., in the afternoon; previous [to] going up to the bulkhead; they were both in their office together when I saw them; I had a conversation with both of them together at the time about various things, and particularly about the ship Potomac. I talked with the Simpsons first about the ship Potomac, about two weeks before she was sold; had not been in their employ before that. I first knew she was to be sold by seeing the advertisement in the papers. Simpson and I happened to be talking about her through Mr. Baker. I was looking for a ship for employment about that time. Baker knew the Simpsons, and they wanted to buy a ship, and employ a capt. Baker introduced me to the Simpsons.

Adjourned to Dec. 7th, 1857.

Dec. 7th. Parties appear, pursuant to adjournment, and libellant's counsel proceeds with the cross-ex.

I presume some of the other inspectors inspected this job whilst it was being done; I presume so, because I saw them three looking, and on board the ship; I don't know their names; I knew their

names at the time, but don't remember now; I knew what offices they belonged to at the time; Merry is the only one I remember now; I remember his name, because I requested him to survey the vessel; I requested him to survey the vessel, because he was agent for the Lloyd's and of the New York ins. companies. We had to have her inspected, in order to have her insured; I had nothing to do with having her insured; she was not my ship. I had a conversation with one of the other inspectors, to the best of my knowledge, which was after the principal portion of the old planks was taken off the ship; the conversation was in regard to some timbers which should be put in the bow of the vessel, which was a little decayed. I wanted to know whether it was actually necessary to put them in or not; he, the inspector, thought it was best to put them in. I don't remember the day the planks *was* stripped off; at the time of the above conversation with the inspector, we replaced those pieces of timber. I spoke to the inspectors because I wanted them to inspect her as to the repairs; it was at the request of the Messrs. Simpsons; both of the Simpsons requested me, that is, Solomon and Lissack, jr.; this conversation was with both of them together; don't remember the day or date; I am sure it was in September; I wont be positive as to the time it was in September; I can't remember whether it was the first or last part of the month; it might be in the middle; this conversation with the Messrs. Simpsons was before any repairs was commenced on her; can't remember how long it was before the repairs commenced. This conversation with the Simpsons was, that it would be better to call the inspectors to look at the ship before the repairs commenced, so as to get their ideas as to the amount of repairs, or what was necessary to repair the ship. I don't know that it was for the purpose of getting the ship insured. I swear that I don't know that the inspectors were requested to inspect the vessel with a view to have her insured. I don't know whether this vessel was insured afterwards or not. The inspector, whose name I don't know, was a tall man, rather stout, and I believe generally carried a walking cane with him. I knew his name at the time, but have forgot it now. I did not show him any borings of the ship. All the conversation I have stated I had with the inspector. I don't recollect it is all I remember of having with him. This inspector was with me but a few minutes; don't know where he was when he was not with me on the vessel; did not see him when he first came there, or when he went away. When I had this conversation with him he was not on board the ship, but on the bulkhead; don't know of his going on board the ship; did not see him on board. I requested Merry to go with me, because I wanted to have the vessel examined.

Q. Is it usual to take the inspectors of underwriters with you when you bore *have* vessels?

(Objected to by claimant's counsel. Overruled.)

A. I can't answer that question whether it is usual or not; I

don't know; I never had one with me before when I bored a vessel; never saw any one have an inspector with them when they bored a vessel; I had seen a vessel bored before. I know there *was* nine boys to work, because I counted them; I counted them on various occasions when they were at work; I counted them on probably two occasions, probably on five—more than once, any way; did not fix the days, nor any way near; don't know on what part of the work they were at when I counted them; I counted them more than once; they were boys; I could distinguish [them] from men that were at work; I did not make any memorandum of the boys more than count them; I counted the boys, because I thought there were a great many for the number of men; I am sure there was that number of boys; they might have been more; I counted nine boys at one time. I first told Baker that another man had estimated on the job before he commenced on the work. I want to alter that I told him that men had estimated, instead of man. I told Mr. Botifuhr and McGennis had estimated for the work. I told Baker this not more than twenty-four hours before the job was awarded to Mr. Baker—whether before he commenced the work or not, I can't say; I mean twenty-four hours before Baker knew he would get the job. I think Baker and myself knew he would get the job positively about the same time. McGennis did make a written estimate, and Botifuhr did also. I don't know where those estimates are: I saw them last in their hands; they were delivered to me to look at, and I gave them right back. Mr. Simpson's folks saw the estimates; I presume the contractors showed them to the Simpsons; I supposed they were *showed* to the Simpsons, because they could state exactly what they were; never saw the Simpsons have them—I don't think I did; come to think, I *see* Mr. Botifuhr's in their hands; it was after I had seen it; come to think again, Mr. Simpson sent Mr. Botifuhr with the estimate to me; I think that was Mr. Botifuhr's words when he handed me the estimate; I think he handed me the estimate somewhere in Water street; I could not state the time exactly, whether previous to the time the ship was bought or after, but think it was previous. I attended the sail; did not bid at the sale; I went to the sale in company with one of the Simpsons—Solomon and Lissack, jr.; I wont be positive whether Solomon or Lissack bid at the sale; I don't think I advised with them as to the biddings; I don't recollect whether I had any conversation with the Simpsons at the sale; I don't recollect of having any.

(The claimants here object to the conversation in regard to the sale, as immaterial, &c. Reserved.)

Q. Did you make any examination of the vessel after you saw Baker's bill for the repairs?

A. For repairs I did.

Q. What did you mean when you said that you had made no such examination?

A. I did not say so.

Q. What did you say?

A. I was under the impression, from the question you gave me, that you meant estimates, not bills; and it was under that impression that I said I had made no examination. I made the examination about the time the paint was putting on; can't fix it more definite. I did not see Mr. Baker's bill for repairs until I had examined the ship. I examined the ship after the work was done. The ship was in the same locality when she was repaired *in* when I examined her. I don't know that there was any one with me when I examined her. I think Drew was with me part of the time when I examined it. I might have been an hour, an hour and a half, or two hours examining the vessel. Drew was there principal part of the time, looking out for himself; he was pointing out some items to me, and I was pointing some out to him; he was there examining the vessel; we were examining the vessel on joint account—that is what it amounts to; he commenced examining some few minutes after me, if he did not at the time; I wont be positive. I wont be positive whether we stopped examining together or not; I made no written memorandum of the examination at the time; can't tell how many tree-nails I chalked at that time; the job was finished at the time of this examination with Drew; I could not say whether it was the same day the painting commenced; they may have been painting one or two days; I can't say on the upper part of the ship; the new work was all bare; I don't say positive the new work was all bare—there might have been a lead color on it, to keep the work from cheeking; I wont be positive, but there was more paint on some of it. Drew was in the hold the same time I was, during the time whether I had been *been* longer or shorter I don't know. I could not swear to any positive amount of work that had not some paint on it.

Adjourned 28th Dec., 3 o'c.

Dec. 28th adj. by consent to Dec. 29th, 3 o'c., when parties appear, and libellant's counsel proceeds with the cross-examination, as follows, viz:

Dec. 29th, 3 o'c.

I did not see the Messrs. Simpson before I had the conversation at the bulkhead. I don't remember of seeing them that morning before the conversation. I could not say positively whether I was down to their place that morning before the conversation.

I don't think I was there; I saw them in the afternoon of the day previous to the conversation. I saw Mr. Solomon Simpson the day before the conversation at their office. I know this, because I was in the habit of calling at their office in the afternoon. I don't say positively I saw them that afternoon; it was Solomon V. Lissack I saw the day before the conversation, in the afternoon. I was down to their office the day before the conversation at the bulkhead, pro-

viding that day was not Sunday; if it was Sunday I was not there. I made the bargain to go in this vessel for the Simpsons the day after the sale; it might have been three days after; it was not before. We might have talked about my going in it before; but when you speak of the bargain, it was after the *sale.* I never had any conversation with any one about selling any part of this vessel to Capt. Bailey; not any part that I have any control of. As regards selling any part of this vessel, I had no conversation with Capt. Bailey; I told him Mr. Simpson would sell him part; I never talked with Baily about selling any part of this vessel that owned. He asked me if part of the vessel was for sale; I told him that a master's interest in the ship was for sale—for to call on Mr. Simpson and brothers, and they would arrange about. He asked me what I thought a portion, a master's interest, would cost; I think it was an eighth; I won't be positive. I told him I thought, Mr. Simpson would sell him a master's interest at the cost; that I believe was the whole am't of the conversation that I recollect. I recollect of seeing Capt. Bailey at Messrs. Simpsons' office. I never told Capt. Bailey that I owned or controlled a part of this vessel. I never told Mr. Babbage that I owned any portion of the vessel; I told Capt. Bailey I would use my influence to get him an interest in the ship. I did not want to go in the ship, and they wanted me to recommend a man. It was after Baker began the repairs, I concluded I did not want to go in the ship. It was in Sept. sometime; they wished me to recommend a good trusty man, that would take an interest in the ship—I mean a master's interest. I have stated all the conversation with the Simpsons in regard to selling an interest. I never had any conversation with Babbage about his buying an interest in the ship more than I have stated, except, if he knew a good man to take an interest, I could get him one in the ship. I believe Capt. Bailey had command of the ship two days, then I made up my mind I would go. Capt. Bailey had not the funds that he represented he had to take the interest. He made those representations to the Messrs. Simpson; I heard him make these representations to Simpsons; it was at the Messrs. Simpsons' office. Mr. Solomon Simpson, Capt. Bailey, and myself were present; those were all that took part in the conversation; I took part in introducing the men; I introduced Capt. Bailey to Solomon Simpson at that time; I said nothing about the price of the ship, only spoke of her as a good sound ship; I said nothing else; that was all I said at that time, beside introducing Capt. Bailey. The planks were not off the ship whan Merry bored her; there might have been some pieces off the bulwarks, but not taken off by Baker. I don't know what became of Merry's report; I think I saw it in the insurance office on their book; that is the only place I ever saw it; I think that is his written

report: Merry's Lloyd's report I had with me; it was lost with the ship; I believe I got it from Capt. Merry; he gave it to me, I think, two or three weeks before I sailed. I could not distinctly say when he gave it to me; it might have been five, and might have been three weeks after Baker finished the job, before I sailed; there were some spars Baker put in that did not come till the last thing, a day or two before we sailed; I am in the Simpsons' employ now, in the Lucky Star.

Re-examined on the part of deft.

Mr. Baker offered me commissions in this matter; said I should have such and such commissions; there was nothing very definite said about it, but the usual commissions; he said distinctly I should have five per cent.; he did not offer me anything directly to sign the bills; I can't exactly remember the conversation in regard to that, but he said he would make it worth my while if I would sign the bill or bills; those are the words, or the purport of what he said. The Simpsons were not present at the first conversation in the morning on the bulkhead; after the first conversation in the morning, but on the same day, I did hear a conversation between Messrs. Simpson and Baker, before Baker went to work, when Capt. Baker spoke about the amount of the job. Solomon Simpson was there, and took part in the conversation at that time. There was no difficulty in determining that the apprentices, or those I mentioned, were boys; I mean to say, in my direct examination, that where the work was done, it had the appearance of being well done; the appearance was given to it that it looked well, until it went into the water, and then it was evident it was not well done.

Re-cross-examined by libellant's counsel.

I mean, it was evident when she began to get her ballast in, because the water began to come in, the putty began to fall out; this was probably three weeks or a month before she went to sea; that conversation which I have now spoken of in my re-direct, between Simpson and Baker, was the only conversation between them I heard.

JOHN SWEENEY.

Adjourned to Dec. 31st, at 3 o'c.
Adj. to January 4th, 3 o'c.

JAN'Y 4TH, 3 O'C., P. M.

Cross-examination of Sweeney continued by libellant's proctor.

Baker spoke to me first about the commissions the same day of his arrival after his return from the east; this was the same day I had a conversation with Baker on the bulkhead; I had but one conversation with Baker about doing the work previous to his going to work, which was on the bulkhead; the conversation that took

place there, was, that he would do the work one shilling a day extra for the men; three dollars for foreman, and being better posted in buying materials than I was, that it would be advisable to let him buy them, and that Messrs. Simpsons' people would pay the bills for materials: this conversation was, to the best of my knowledge, in the forenoon; it might have been continued during that day; I might have stopped to consider about it and come back to give him my decision; I did not come back and give him my decision; I could not tell what portion of this conversation took place in the forenoon or what in the afternoon; I think the principal part of it took place in the forenoon; this conversation commenced on the sidewalk in the vicinity of the bow of the ship; can't tell how late in the afternoon the conversation continued, nor how much of it took place in the afternoon; Baker spoke about the commissions previous to speaking about the price of the work; the conversation commenced with, How are, &c., and he said I want that job; if you will give it to me I will give you five per cent.; that kind of staggered me a little; I said to give me five per cent. he would have to take it out of the job, and that there was competition in reference to the job; that is, there was other estimates, and I would much rather he would figure it down; he answered me by No, no, it is usual; then stated the conversation as to what he would do the job for; he then said he would do the work for the price I have before stated; that was about the amount of what was said about the commissions; that was all I recollect of about the commissions; I have stated to-day all the conversation with Baker I now recollect on this day spoken of.

I have no interest in this suit as far as dollars and cents are concerned; I had no interest in the ship as owner at any time, directly or indirectly.

Re-examined.

Baker did say something to me about Drew's being a partner of his; he said he was a partner.

Cross-ex'd.

I mean to say that the words used by me above, were the words Baker used; in the first place he told me that anything I done with Mr. Drew was the same as though I done it with him; that is about it; I mean to swear that Baker stated he was a partner; he first told me that Drew was a partner some two months previous to his having anything to do with Potomac; that might have been on the sidewalk, in his yard, or front of the office; I can't recollect exactly where it was; Baker used the word partner after his return from the east, when I saw him the first time, and had the conversation on the bulkhead.

JOHN SWEENY.

Adjourned to Jan'ry 4th, at 3 o'c.

January 4th, 1858. Parties appear, pursuant to adjournment, and

John H. L. Botefuhr, being duly sworn on the part of respondent, says: I was shipwright and caulker and sparmaker in 1855, and carried on that business in Brooklyn; I know the ship Potomac; I estimated for the work that Baker & Co. done on her; I examined the work to be done before I estimated; the work done, in my judgment, I valued at $1,050 or thereabouts; I would say that that was a fair value for the work; I saw the vessel laying in front of Baker's place just before she was hauled out; all the work was done except painting, and part of it was primed and part not; there was a little joiner work and some repairs done to the rudder after I made the estimate.

Q. Was there any more work done when you examined after the work was done than you were willing to have done for $1,050?

A. There was more than I would have been willing to do for $1,050; there was repair on rudder and some repairs on bulkwarks which I would have brought in an extra bill; I should presume $150 would have been a good price. We know Mr. Baker as a ship-master; I don't know him as a practical ship-carpenter; I was familiar with the prices of materials at that time; the price charged in exhibit No. 1 on the part of def't by dealers in those articles was not the right charge; the oakum was more than I ever charged; and pitch, pitch-mops, spun oakum; oil I never charge for; I don't know what others do; I know some others don't; composition spikes are overcharged, and the fine-spun cotton is an overcharge; oak knees for the head is an overcharge; spruce is also an overcharge.

Q. Was the quantity of material charged in that bill used in the work which you examined in that vessel?

Adj. to Dec. 5th, 3 o'c.

Dec. 5th. Parties appear and proceed to the examination of witness.

A. The quantity of materials charged were not used.

Q. Give us the articles not used.

A. The oak plank; there is more treenails charged than was drove in the vessel; there is in the neighborhood of over two thousand treenails charged than was used; I made 2,200 at the time.

I think it was that; there is considerable more oak plank charged than used; the acc't in one charge is 14,669; all I could make on her, allowing for waste, was about 8,000; that was allowing waste in cutting.

Q. Did the 8,000 feet which you found include the oak in the work which you would have done for $1,050.

A. Yes, sir.

The next charge of any importance is the hard pine; as near as

I can figure, it is little over double charged; the next of any importance is the labor; in answering this question of labor, I shall answer it as to what I would do it for: in doing the same work I should have used about four hundred days' labor; the $1,050 included the blocks with work and all; carpenter work, caulking and material, and all the work independent of stern-posts, rudder, bulwarks, spars; this $1,050 I mean I would have included the work I would have done on her top wales, from her copper up, and also the head knees as far as where the plank was taken off and replaced in the new; there was no work done on the vessel except the stern-post, rudder, bulwarks, and spars but what was included in the $1,050, except there might have been a few new timbers put in; $400 would do all this work with rudder, bulwarks, stern-post, and spars, and leave a good margin for profit that would include the blocks with carpenters and joiners and all work done to the stern-post, bulwarks, spars, and rudder. I passed the work while it was going on, but did notice it particularly; I did not notice whether the work was being done by boys or men.

Cross-ex'd.

At the present time I have no place of business; I gave up business about two months ago; I am doing nothing now; playing gentleman, if doing nothing is playing gentleman; my place before that was the corner of Watt and West; I had a small place there, and my business was long shore repairing; I had a shop and small yard there; I am a citizen of this city. Baker put on new plank from her copper up to her wales; took off the old, caulked, fastened, and planed them off; put on new head-knees; two head-knees forward, if my memory serves me right; unshipped the rudder; took off the rudder-stock; replaced that with new; I wont be certain whether he put on a whole stock or not; put on part of a new stern-post, that is, the upper end of it; supplied some spars, I presume, for I saw them there; I could not state positively what spars they were; sticks that would make top-mast, jib-boom, lower yard, and I think, topsail yard, and some light spars spruce; I can't state exactly the number; I think, if my memory serves me right, there was twelve or fifteen; there were repairs on bulwark, that is all I remetmber of; I think there was a place amidships where there was some small work done; shutters put on; that is all I can remember of; this work which I have now detailed was the work done on the vessel which I have been speaking of.

Adjourned to Jan'y 6th, 3 o'c., to continue cross examination.

JAN'Y 6TH. Parties appear pursuant to adjournment, and by consent, adjourn to Jan'y 8th, 3 o'c.

JAN'Y 8TH. Parties appear, and lib'ts. counsel proceeds with cross ex'n of last witness, as follows, viz:

When I said I was not in any employment, I meant I was out of business; I am now engaged to go to sea with Sweeny in the barque Lucky Star, in the employ of the Simpsons; I have been talking of this arrangement for the last two months; I concluded the arrangement on Tuesday; I go in the capacity of second officer; I did not know for a certainty I was going out with Sweeny when I was ex'd last; I think Baker put on the vessel in the neighborhood of — streaks of plank; I should suppose that next to her copper her streaks would be in the neighborhood of two inches; the upper ones, I should think, in the neighbourhood of seven inches in width; I had it all figured up at the time; I don't remember now; I did not go in the hold of the ship while the work was being done; nor up on the staging; I have forgotten the ship's length now, and therefore could not tell exactly what would be the number of feet in the streak next the copper.

Q. Give us your best judgment as to the number of feet in the streak next the copper.

A. I presume somewhere in the neighborhood of twelve hundred feet in the lower streak. I measured the length of the ship before she was sold; some three or four persons asked me to go on board and survey the ship before she was sold; I think Capt. Sweeny asked me; don't remember whether the Simpsons ever did or not; Capt. Sweeny, I think, was with me at the time; I measured her length; did not make a written survey of her then; I made a mere memorandum of it; I made an estimate for this work just after the Simpsons got possession of her; I think a week after; the Simpsons, I think, sent me a letter to put in an estimate for repairing the vessel; I handed in a written estimate; the first knowledge I got that I was not to have the job was by seeing men at work at her; it might have been some seven or eight days after putting the estimate in. On the 8th of Nov. I left New York and went west, and from jogging my memory, I believe it was finished the latter part of October; can't tell the day; Sweeny never asked me to estimate on the ship; I was not acquainted with him until about two weeks before the Potomac was sold.

Re-ex. by respondents.

I made an estimate and kept a copy of it; I have not got it now; I have looked for it and cannot find it; what I called the estimate, I handed a copy to Simpson.

J. H. L. BOTEFUHR.

Adj'd to Jan'y 18th, 3 o'c.

Michael Driscoll being sworn on the part of respondent, says: I am a ship-carpenter; know Mr. Baker and the ship Potomac; I have done work on the Potomac at the time Baker repaired her; I put fourteen streaks of plank around her, I think; I done it for Mr. Baker.

Q. Did Mr. Baker's men put the plank on, or did yours? Obj. by Mr. Benedict. Overruled. Ex'n.

A. The men that I employed put the plank on; I kept the time of the men who did it; I paid them.

Q. What were you to get from Mr. Baker for putting on those fourteen streaks of plank?

Obj. to by Mr. Benedict. Overruled. Ex'n.

Q. What was the value of the work you put on her?

Obj. by Mr. Benedict. Ex'n.

A. I rather think $350.

Q. Repeated.

A. $25 streak for fourteen streaks; I did not furnish the materials; I can give the am't of material in the work; the vessel was one hundred and twenty-two feet long; I double that for the streak, that running all around; there is one-third of that is oak and balance yellow pine; the thickness of the streak is four inches; the depth of the whole work was nine feet; the plank was seven inches wide and four inches thick; I would allow one-fourth for the pine and one-third for the oak as loss in working; there must be one-fourth added of pine and one-third of oak to make up the original am't of material used. The yellow pine was first quality of timber; the oak was an inferior quality; I suppose it was an inferior quality; pine was about 4c. per foot at that time; the oak on her could be bought for 3½c.; I have called persons' attention to the oak at the time it was put on; I called Mr. Norris' attention, and Baker's foreman and Mr. Baker himself; I did not take off the old work; I saw the place it was taken off from; I have been a ship-carpenter twenty years; I could tell what work had been done in removing the old work; I could take off the old work and prepare it for the new work for $18 to $20 per streak; that would be a fair value for doing it; I know Mr. McGenniss; I know that McGinness was around the vessel before the work commenced; don't know anything about the spars that was furnished, and I don't know nothing about the work around the rudder; there was one hundred and twenty-two treenails on a side in a streak; two hundred and forty-four all around; I suppose there was about three hundred wages in her beside treenail wages.

Cross ex'd by Mr. Benedict. I am in the government employ now, at work on a ship in the navy-yard; I worked on the Kitty Simpson for McGinness; she was owned by the Simpsons; I did not put all the fourteen streaks on the vessel; there was one piece of a plank in putting on broke, and it broke out to make it good.

Q. Do you mean by that that some of your work was done over?

Obj. by Mr. Donohue. Ex'n.

A. I hardly can answer that to do justice to both parties; I put on the first plank that was put on the vessel; I done all the planking on the vessel except that I have stated; I supposed I did it all;

I never measured the length of the ship; I measured the width of all the plank put on her; I did not count the treenails that was put in her; did not count the wedges put in her; can't tell you how many wedges was put in her; I left McGinness' employ Wednesday last; I have had two or three jobs of putting plank on to ships; I bought plank for McGinness the season the Potomac was repaired; I was in McGinness' employ that season; I had a contract job for him the same as for Baker; I bought more than twenty plank for McGinness that fall; the plank put on this ship was the common oak plank, not as good as usually put on; more than one-third of the plank was not as good as usually put on; I did not count the plank that were not as good as usual; I condemned some of the plank that I got out of her; I did not know Sweeny then; I did not know the capt. of the ship.

MICHA'L DRISCOLL.

Adj'd to Wednesday, May 26th, 3 o'c.

July 7, 1858. Parties appear, and Mr. Benedict recalls Hewlett J. Norris on the part of the libellant.

The job we first commenced on the Potomac was to put some pieces on the lower part of the bends, called graven pieces; these graven pieces were put in all around the vessel where the plank was spauled or worm eaten; there was a change in repairing the vessel after this; the change of the plan was, instead of putting in graven *pieces*, to take off the plank, and put in new pieces; the plan was changed, and the graven pieces were taken out, and new plank put in their places; it was some three or four days from the time we commenced putting in the graven pieces before we concluded to change the plan, and put on the plank; under the change of plan there was some 14 streak of *plan* taken off, and new ones put on; we raised the copper on her one or two courses, and put some new plank under the old copper; this copper was all put on before there was any painting done on the new work; she was not bored more than once, to my knowledge; I bored her with Capt. Sweeny, at his request; he was with me part of the time, and part not; we bored her to ascertain whether her frame was sound; we wanted to know whether her frame was sound, so as to know whether it would do to take her plank off; the reason was on account of seeing whether it would do to allow the insurance company to examine her frame; it was on account of the inspectors who would examine her; I don't recollect of any one being present there, except Sweeney, when I bored her; this was before we began to take the plank off that we bored her; we found some of her timbers rotten after we took her plank off, and had to put new timbers in her; it was not possible to count the treenails after the copper was on, because they could not be counted under the copper; they could not be counted on the inside, because a great many did not go through; it would be almost an impossibility for a person

to count the treenails on a ship after the staging was taken down; under the first job, we used floating and hanging staging; when we changed the plan, we put up permanent staging around the ship. After the vessel got around to the North river, I was present at a conversation between Mr. Baker and one of the Simpsons; this conversation was at the foot of 30th street, where the ship loaded; this conversation was in regard to having Baker do more work. After they had talked over the work, and what it would cost, Mr. Baker advised them not to do it; there was no fault found about the work at that time; I never heard any fault found about any of the work by Sweeny or any one else, while it was being done, or any other time. I understood from Sweeny, at the time I bored the ship, that he owned an interest in her.

Cross-ex'd by Mr. Andrews.

This plan was changed on account of objections by the inspectors; they thought the ship was too much wormed, and thought they ought to be taken off, and plank put on. I don't know whether the bill had been presented at the time of the conversation I last above alluded to. Sweeny told me how much the vessel cost, and that he owned an interest in her; how much or how little, I don't remember.

Re-ex'd.

We put two new head knees, new channels, all round; those that were not new we repaired; new main hatches and combings, and everything appertaining to the hatches; put in new ceiling plank where we took off old ones; put oak fenders on board, new stern post, new rudder stock, and the fixtures to the rudder, spars, &c.; we made quite a number of spars there.

H. J. NORRIS.

August 16th.	Reported due	$3,351 59
	Interest	644 59
		$3,996 18

Endorsed: 13,144. U. S. dist. court. Elisha Baker v. the Ship Potomac. Minutes of testimony on reference before C. W. Newton, U. S. Com'r.

No. 307. NEW YORK, *October* 27, 1855.

Saint Nicholas Bank, pay to E. Baker & Co., or order, five hundred $\frac{00}{100}$ dollars.

$500 $\frac{00}{100}$. L. H. SIMPSON & SONS.

(Endorsed.) E. Baker, & Co., Elisha Baker.

No. 1 on the part of def't.

C. W. NEWTON.

(No. 59.)

NEW YORK, *Oct.* 23d, 1855.

Ship Potomac and Owners,

To E. Baker & Co., Dr.

Shipwrights and Caulkers.

All kinds of spars made to order; vessels docked, &c. Yard No. 248 and 249 South st., and 485 Water st., between Pike and Rutgers st., (opposite Balance Dock.)

To	60 lbs. spun oakum, a. ½	$7 50
"	2 lbs. pitch, a. 3.00	6 00
"	4 pitch mops, a. 3½	1 50
"	44 ft. oak, a. 4 c	1 76
"	12 lbs. spikes, a. 8 c	96
"	2 cartages, a. 3	75
"	12⅝ days' works, a. 2½	32 81
"	9 lbs. nails, a. 6c	54
"	1280 lbs. spikes, a. 8c	102 40
"	Spars for spalls	25 00
"	5400 locust treenails, 4 c.	216 00
"	14669 feet oak, a. 4c	586 76
"	truckage on oak and pine	42 00
"	cartage	9 00
"	paid rigger's bill	4 00
"	236 feet w. pine, a. 4	9 44
"	500 oak wedges, a. 5c	25 00
"	paid laborers	1 50
"	102 composition spikes, a. 2c	25 50
"	775 lbs. spun oakum, a. ½	96 88
"	4000 treenail wedges	5 00
"	6645 feet h. pine, a. 4c	265 80
"	80 lbs. copper bolts, a. 35c	28 00
"	deck plugs	1 25
"	2½ galls. oil for caulkers, a. 8	2 50
"	15 lbs. spun cotton, a. 15c	2 25
"	topsail yard 46 ft. × 12 in	20 00
"	2 stump top gall. mast, a. $7.50	15 00
"	2 oak knees for head, a. $8.00	16 00
"	h. pine top-mast, 37.8×13⅜	40 00
"	3 bbls. pitch, a. $3.00	9 00
"	do tar	4 00
"	paper tacks	13
"	punching 100 sheets copper	1 00
"	6 mops, a. 3	2 25
	Amount bro't over	$1,619 48
"	paid watchman	14 00
"	6 lbs. composition rings	2 10

To	candles for light in hold		$1 00
"	252 feet oak for stern post, a. 4c		10 08
"	1 sheet felt		25
"	oak for rudder stock		20 00
"	8 lbs. sheet lead, a. 10c		80
"	composition rudder saucer		3 50
"	222 feet spruce, a. 3c		6 66
"	843 days' work, a. 2½		2,212 88
			3,890 75
	Amo't bro't forw'd.		3,890 75
By	1211 lbs. old spikes, &c. 12,		
"	punching copper, &c.		19 16
			3,871 59
			20 00
			$3,851 59

Endorsed: Exhibit No. 1 on the part of def 't, January 4th, 1857. C. W. Newton, U. S. Com'r.

NEW YORK, 23*d October*, 1856.

Ship Potomac and Owners,

To E. Baker, & Co. Dr.

To	60 lbs. oakum, ½		$7 50
"	2 bbls. pitch, $3		6 00
"	4 mops, 3		1 50
"	44 feet oak, 5		2 20
"	12 lbs. spikes, 3c		96
"	2 cartages		75
"	12⅜ days' work, 2½		32 81
"	9 lbs. nails, 6		54
"	1280 lbs. spikes, 8		102 40
"	spars for spalls		25 00
"	5400 locust treenails, 4		216 00
"	14669 feet oak, 4½		600 10
"	truckages		42 00
"	cartages		9 00
"	paid rigger		4 00
"	236 feet w. pine, 4		9 44
"	500 wedges, 5		25 00
To	102 lbs. composition spikes, 25		25 50
"	paid laborers		1 50
"	775 lbs. oakum, ½		96 88
"	4000 treenail wedges		5 00
"	6645 feet h. pine, 4		265 80

To	80 lbs. copper bolts, 35		$28 00
"	deck plugs		1 25
"	2½ galls. oil		2 50
"	15 lbs. spun cotton, 15		2 25
"	topsail yard		20 00
"	2 stump top gall. masts		15 00
"	2 top studds. sail booms		12 00
"	2 oak knees for head		16 00
"	topmast h. pine		40 00
"	3 bbls. pitch, $3		9 00
"	1 " tar		4 00
"	1 paper tacks		13
"	punching copper		1 00
"	top gall't yard		12 00
"	6 mops		2 25
	Am't bro't forward		$1,705 26
"	paid watchman		14 00
"	6 lbs. composition rings		2 10
"	candles		1 00
"	252 feet oak stern post, 4½		19 34
"	1 sheet felt		25
"	1 oak rudder stock		20 00
"	8 lbs. sheet lead, 10		80
"	composition rudder saucer		3 50
"	222 feet spruce, 3		6 66
"	843 days' work, 2½		2,212 88
	Carr'd forward		3,985 79
	Am't bro't forward		$3,985 79

Cr.

By	studd'g booms	$12 00	
"	punching metal	1 00	
"	1211 lbs. old iron spikes, 1½	18 16	
"	oak and pine ret'd, 500 a. 4c	20 00	51 16
			3,934 63
Add error, 201 feet oak, 4½			9 04
			$3,943 67

Endorsed: Exhibit A. on reference, Dec'r 13, 1856. C. W. Newton, U. S. Com'r.

U. S. DISTRICT COURT.

ELISHA BAKER
vs.
THE SHIP POTOMAC, her tackle, &c.

Commissioner's Report.

In pursuance of a decretal order made in this cause, on the 11th day of December, 1856, by which, among other things, it was referred to one of the commissioners of this court, to ascertain and compute the amount due the libellants in this cause—

I, Charles W. Newton, U. S. commissioner for the southern district of N. Y., to whom the matter was referred, do hereby report, that I have been attended by the proctors for the respective parties, and do find and report that there is due to the libellant, for the articles and materials furnished and labor done for and towards the repairing of the ship Potomac, the sum of three thousand three hundred and fifty-one dollars and fifty-nine cents, together with the sum of six hundred and forty-four dollars and fifty-nine cents interest, amounting in all to the sum of three thousand nine hundred and ninety-six dollars and eighteen cents at the date of this my report. All of which is respectfully submitted.

$3,996 18.

Dated New York, August 16, 1858.

CHAS. W. NEWTON,
U. S. Commissioner.

At a stated term of the district court of the United States of America, for the southern district of New York, held at the City Hall, in the city of New York, on Monday, the 6th day of September, in the year of our Lord one thousand eight hundred and fifty-eight:

Present, the honorable Sam'l R. Betts, district judge—

ELISHA BAKER
vs.
THE SHIP POTOMAC, her tackle, &c.

The time to file exceptions in this cause having expired, and no exceptions having been filed.

On reading and filing the report of Charles W. Newton, United States commissioner, to whom the above matter was referred, by which there is reported due the libellant, for supplies furnished the ship Potomac, the sum of 3,996 dollars and 18 cents; on motion of Benedict, Burr & Benedict, proctors for the libellant, it is ordered, that the report be in all things confirmed, and that the libellant recover in this action against the said ship, her tackle, &c., the amount reported due, together with his costs to be taxed.

And on like motion, it is further ordered, that in pursuance of the act of Congress, passed March 3d, 1847, a summary judgment

be, and the same is hereby entered against Lissach H. Simpson, the principal, and Abraham C. Bell, the sureties on their bond, given on the discharge of the property arrested, for the sum of $7,735\frac{98}{100}$ dollars, the amount of their said bond, executed on discharging the said ship from custody.

And on like motion, it is further ordered, that unless an appeal be taken to this decree within the time limited and prescribed by the rules of this court, that the libellant have execution to enforce satisfaction of this decree.

SAM'L R. BETTS.

BENEDICT, BURR & BENEDICT,
Proctors for the Libellant.

[Endorsed:] Vol. 13, No. 144. United States district court, for the southern district of New York. Elisha Baker vs. the Ship Potomac, her tackle, &c. Benedict, Burr & Benedict, proctors for libel't. Final decree in rem on confirmation of commissioner's report, and summary judgment on bond, under act of Congress March 3d, 1847. Filed and entered the 6 day of Sept'r, 1858. We hereby consent that the within decree and the judgment docketed thereon be set aside, and the clerk have leave to file his exceptions to the report of the comm'r. Benedict, Burr & Benedict, prs. for lib't. Oct. 16, 1858.

At a stated term of the district court of the United States of America, for the southern district of New York, in the second circuit, held at the City Hall, in the city of New York, on Tuesday, the 19th day of October, in the year of our Lord one thousand eight hundred and fifty-eight:

Present, the honorable Samuel R. Betts, district judge—

ELISHA BAKER
vs.
THE SHIP POTOMAC, her tackle, &c. } Vol. 13, page 144.

On filing a consent, signed by Benedict, Burr & Benedict, proctors for the libellant, and on motion of Charles Donohue, esq., proctor for the claimant, it is ordered, that the decree heretofore entered in this cause, and the judgment docketed thereon, be set aside, and the claimant have leave to file his exceptions to the report of the commissioner.

Endorsed: Vol. 13, No. 144. U. S. district court for the southern district of New York. Elisha Baker vs. the Ship Potomac, her tackle, &c. Benedict, Burr & Benedict, proc. for lbt. Beebe, Dean & Donohue, proc's for clmt. Order to set aside decree and judgment, with leave to file exceptions of clmt. of com'r's report. Filed the 19th of Oct., 1858.

U. S. DISTRICT COURT.

ELISHA BAKER
vs.
THE SHIP POTOMAC, &c.

First. The commissioner has reported for an amount far exceeding any amount of work performed and materials furnished.

Second. The libellant has not proved any work performed for which he is entitled to a decree.

Third. The libellant is not under his pleadings entitled to any decree whatever in his favor.

Fourth. The commissioner erred in admitting evidence for libellant, and also erred in rejecting evidence offered for respondent.

BEEBE, DEAN & DONOHUE,
For Clmt.

Endorsed: 13,144. U. S. dist. court. Elisha Baker vs. the Potomac, &c. Exceptions. Beebe, Dean & Donohue, for clmt. Filed 16 Oct., 1858.

At a stated term of the district court of the United States of America, for the southern district of New York, in the second circuit, held at the City Hall, in the city of New York, on Tuesday, the 26th day of October, in the year of our Lord one thousand eight hundred and fifty-eight:

Present, the honorable Samuel R. Betts, district judge—

ELISHA BAKER
vs.
THE SHIP POTOMAC. } 13,144.

The exceptions on the part of the claimant to the report of the commissioner in this cause having been submitted by the respective parties to the court, and coming now to be heard and determined, and it being considered by the court that exception Nos. two and three, having reference to matters adjudged by the court on the hearing and determination of issues in the cause, are irrelevant and impertinent to the finding and report of the commissioner, under the order of reference, and cannot in that manner bring in review the decisions of the court leading to said order of reference; and it being further considered by the court that the further exceptions Nos. one and four point out and designate no particular fact or determination in which the commissioner was guilty of any error or mistake in his proceedings or report, it is ordered and decreed by the court that the exceptions to said report filed by the claimant in this cause be overruled, and that the said report be confirmed in all things, and that a decree be entered for the libellant thereupon for the sum of $3,996 18, with interest from the time of filing said report, together with costs to be taxed.

SAMUEL R. BETTS.

Endorsed: Vol. 13, No. 144. U. S. district court for the southern district of New York. Elisha Baker vs. the Ship Potomac. Benedict, Burr & Benedict, prs. for lib't. Beebe, Dean & Donohue, prs. for clmt. Order for decree, confirming comm'rs report, with interest and costs to be taxed. Filed the 26th Oct., 1858.

At a stated term of the district court of the United States of America, for the southern district of New York, in the second circuit, held at the City Hall, in the city of New York, on Tuesday the 26th day of October, in the year of our Lord one thousand eight hundred and fifty-eight:

Present, the honorable Sam'l R. Betts, dis't judge—

ELISHA BAKER
vs.
THE SHIP POTOMAC, &c. } 13,144.

This case having been heard on exceptions to the comm'rs' report, and argued by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court that the exceptions be overruled, and that the said report be in all things confirmed, and that the libellant recover in this action against the ship Potomac, her tackle, &c., the sum of three thousand nine hundred and ninety-six $\frac{18}{100}$

$3,996	18
53	67
$4,049	67

dollars, with interest thereon from the 17th of August, 1858, amounting in all to the sum of four thousand and forty-nine $\frac{67}{100}$ dollars, together with costs to be taxed, and that the said ship, her tackle, &c., be condemned therefor.

And on motion, it is further ordered, that in pursuance of the act of Congress passed March 3d, 1847, a summary judgment be, and the same is hereby entered against Lissack H. Simpson, sen'r, the principal, and Abraham C. Bell, the surety, on their bond, given on discharge of the property arrested for the sum of $7,735\frac{88}{100}$ dollars, the amount of their said bond, executed on discharging the said vessel from custody.

And on like motion, it is further ordered, that unless an appeal be taken to this decree within the time limited and prescribed by the rules of this court, that the libellant have execution to enforce satisfaction of this decree.

BENEDICT, BURR & BENEDICT,
Pr's. for Lib't.

Endorsed: Vol. 13, No. 144, U. S. Dist. Court for the Sn. Dis. of N. Y. Elisha Baker vs. the Ship Potomac, her tackle, &c. Benedict, Burr & Benedict, prs. for libl't. Final decree on exceptions to comm'rs report. Filed the 26th day of Oct., 1858.

[REC. CLVI, D. T., 1860—6.]

U. S. DISTRICT COURT.

ELISHA BAKER
vs.
THE SHIP POTOMAC, her tackle, &c.
LISSACK H. SIMPSON, claimant. } 13,144.

GENT: Please to take notice that the claimant appeals from the whole of the final decree entered in the above entitled cause.

N. Y., 28th Oct., 1858.

Yours, &c.,
BEEBE, DEAN & DONOHUE.

To Messrs. BENEDICT, BURR & BENEDICT, *Prs. for Libel't.*
GEO. F. BETTS, Esq., *Clerk.*

Endorsed: 13,144, U. S. district court. Elisha Baker vs. the Ship Potomac, &c., L. H. Simpson, claimant. Notice of appeal. Beebe, Dean & Donohue, prs. clmt. Filed Oct. 28th, 1858.

U. S. CIRCUIT COURT.

SHIP POTOMAC, and appellant,
ads.
ELISHA BAKER, respondent,

To the Judge of the circuit court of the United States for the southern district of New York, in the second circuit.

The petition of appeal of Lissack H. Simpson respectfully shows: That heretofore the libellant above named filed his libel in the district court of the United States for the southern district of New York against the said ship Potomac, claims for supplies furnished to her in the port of New York, where the claimant resides, and where said vessel belongs; that on the face of the libel there was an entire want of jurisdiction in the court, and no cause of action shown. That, thereafer, by the decree of the said court, the said libellant recovered against the said vessel the sum of ; that the proof before the commissioner did not justify any report in favor of libellant for any sum, and, if any, for a much smaller one; that the appellant alleges, that in all said proceedings, and in the decrees, there was and is manifest and sundry errors; and he therefore appeals from said decree and every part thereof, to the next circuit court of the United States for the southern district of New York; and that the said cause be heard anew, on new pleadings and proofs; and that the said decree and every part thereof be revised and annulled, and respondent restored to all things he has lost in the premises.

BEEBE, DEAN & DONOHUE,
For Appellant.

Endorsed: 13,144; U. S. circuit court. Ship Potomac, &c. ads. Elisha Baker. Petition for appeal. Beebe, Dean & Donohue. Filed 3d Nov., 1858.

DISTRICT COURT OF THE UNITED STATES OF AMERICA,
For the Southern District of New York, in the Second District.

ELISHA BAKER, libellant and appellee,
vs.
THE SHIP POTOMAC, her tackle, &c.,
LISSACK H. SIMPSON, claimant and appellant.
} Bond for Costs.

Know all men by these presents, that we, Lissack H. Simpson and Patrick McGinness, are held and firmly bound unto the above named libellant and appellee, in the sum of eight thousand five hundred dollars, to be paid to the said libellant, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the third day of November, in the year of our Lord one thousand eight hundred and fifty-eight.

Whereas the above named claimant hath prosecuted an appeal to the circuit court of the United States for the southern district of New York for the second circuit, to reverse the decree rendered in the above entitled suit by the judge of the district court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

L. H. SIMPSON, [L. S.]
PATRICK McGINNISS, [L. S.]
J. JACOBS, [L. S.]
JOHN C. CONNER, [L. S.]

Sealed and delivered and taken and acknowledged this 3d day of Nov., 1858, before me.

GEO. W. MORTON,
U. S. Com'r.

And on Nov. 19th, 1858, before me, by Jacob Jacobs.

JOSEPH BRIDGHAM,
U. S. Com'r.

Nov. 23d, 1858, by John C. Conner.

GEO. F. BETTS, *Comm'r.*

UNITED STATES OF AMERICA,
Southern District of New York. ss.

Lissack H. Simpson and Patrick McGinness and Jacob Jacobs, being duly sworn, depose and say, and each for himself saith, that he resides in the city of New York, and that he is worth the sum of eight thousand five hundred dollars, over and above all his just debts and liabilities.

PATRICK McGINNESS,
L. H. SIMPSON,
JOHN C. CONNER,
J. JACOBS.

Sworn to this third day of November, A. D., 1858, before me.
GEO. W. MORTON,
U. S. Comm'r.

And on this 19th Nov., 1858, by Jacob Jacobs, before me.
JOSEPH BRIDGHAM,
U. S. Comm'r.

Nov. 23d, 1858, as to John C. Conner.
GEO. F. BETTS,
U. S. Comm'r.

The sufficiency of the sureties to the within bond approved, including Jacob Jacobs.

SAM'L R. BETTS,
District Judge.

N. Y., November 19th, 1858.

[Endorsed:] Vol. 13, page 144, U. S. district court. Elisha Baker, libellant and appellee, vs. the Ship Potomac, her tackle, &c., Lyssack H. Simpson, claimant and appellant. Bond for costs on appeal. Beebe, Dean & Donohue, appellant's proctors. Filed this day of , 1858.

U. S. CIRCUIT COURT.

ELISHA BAKER
vs.
THE SHIP POTOMAC.

GENT.: Please to take notice, that upon the pleadings, proceedings, and papers in this cause, and the affidavit, of which a copy is annexed, we shall move this honorable court, on Monday, the 18th day of April, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, for an order directing the clerk of this court to return to the district court the apostles filed herein, and that the appeal be

deemed abandoned, or for such other or further order as to the court shall seem meet.

New York, Ap'l 9, 1859.

BENEDICT, BURR & BENEDICT,
Proct. for Libellant.

To BEEBE & DONOHUE, Esqs.,
Proct. for Claim't.

BAKER
vs.
POTOMAC.

We consent that the motion in this case be adjourned to 28th, a. 10. a. m.

BEEBE, DEAN & DONOHUE.

Adjourned again to 30th, at 10 a. m.
Ap'l 28, 1859.

BEEBE, DEAN, & DONOHUE.

Within motion adjourned at request of clmt. until Monday, May 2d, 1859, a. 10 a. m.
N. Y., Ap'l 30, 1859.

BEEBE, DEAN & DONOHUE.

U. S. CIRCUIT COURT.

ELISHA BAKER
vs.
THE SHIP POTOMAC.

SOUTHERN DISTRICT OF NEW YORK, *ss*:

Charles L. Benedict, of said district, one of the proctors for the libellant herein, being duly sworn, says that this action was commenced in November, 1855, to recover the sum of $3,867 99, being a bill of repairs on the said ship Potomac; that defence was made only upon the question of amount, and accordingly a decree was rendered in favor of the libellant, without controversy, and it was referred to a commissioner to ascertain the amount; that testimony was taken on both sides before the commissioner, who reported $3,996\frac{18}{100}$ due the libellant, which report, on exception, was confirmed, and a final decree rendered in favor of the libellant on the 26th day of Oct., 1858.

That a notice of appeal was served, and thereafter, as appears by the apostles, a petition and appeal thereafter filed for the purpose of raising the question of jurisdiction, done, as deponent believes; but no copy of said petition and appeal was ever served upon the proctor for the appellees, nor do the apostles contain any affidavit of such service. And the libellant's proctors, within a few days first learned that any petition and appeal had been filed.

That as appears by the apostles, the record and all documents required to be returned with the appeal, were certified by the district clerk, and ready to be transmitted to the court on this 4th of Nov'r, 1858, of which fact, as deponent is informed, in the district clerk's office, the claimant's proctors had due notice; but the appellant did not cause the same to be filed in this court within the time prescribed by rule one hundred and twenty-four of this court.

That some months having elapsed, and said apostles still not being filed, on the 24th of Feb'y, 1859, deponent applied to the clerk of this court for a certificate of such fact, which was duly granted, and the same was duly filed in the district court on the next day; and on the same day deponent gave written notice to the clerk of this court that the appeal was to be deemed deserted, and no papers therein to be received; notwithstanding which, on the same day the apostles were transmitted to this court and received by said clerk.

CHAS. F. BENEDICT.

Sworn before me this 9th day of Ap'l, 1859.

CHAS. W. NEWTON,
U. S. Comm'r.

Endorsed: U. S. circuit court in admiralty. Elisha Baker vs. the Ship Potomac. Aff't and notice of motion. Benedict, Burr & Benedict.

Due service of a copy of the within is hereby admitted.
Ap'l 9, 1859.

BEEBE, DEAN & DONOHUE.

Adj. by consent, to Ap'l 20, 1859. B. D. & D.

Filed May 10, 1859.

Within motion adj'd to May 7th, inst., at 10 a. m., of Nelson, J.
Ap'l 20.

BEEBE, DEAN & DONOHUE,

It is consented that the within motion be adj'd till the 19th inst., a. 10 a. m.
Ap'l, 18, '59.

BEEBE, DEAN & DONOHUE.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the City Hall, in the city of New York, on the tenth day of May, in the year of our Lord one thousand eight hundred and fifty-nine:

Present, the honorable Samuel Nelson, an associate justice of the Supreme Court of the United States—

ELISHA BAKER
vs.
THE SHIP POTOMAC.

On reading and filing affidavit and notice of motion to dismiss the appeal herein, on hearing C. L. Benedict for the motion, and C. Donohue in opposition thereto, ordered that the appellant deposit in court herein the amount of the decree and costs of the district court within ten days, and that on such deposit the motion be denied without costs to either party; otherwise the motion is granted with costs.

S. NELSON.

Endorsed: U. S. circuit court, Elisha Baker vs. the Ship Potomac. Order. Filed May 10, 1859.

U. S. CIRCUIT COURT.

ELISHA BAKER
vs.
THE SHIP POTOMAC.

On reading and filing notice of motion herein, and hearing C. L. Benedict for motion, and C. Donohue in opposition, ordered that the proctor for the libellant have leave to draw from the registry of the court the money paid or to be paid into court herein, in pursuance of the order of the court made May 10th, on the said libellant giving stipulation, with sufficient sureties, to obey the orders of the court herein, and repay and refund said sum, or such part thereof as may be directed by the final decree in this cause, in this or any appellate court, in case of reversal of the decree herein.

Dated May 10th, 1859.

S. NELSON.

Endorsed: Elisha Baker vs. the ship Potomac, &c. Order. Filed May 10, 1859.

Whereas an appeal has been taken from the decree of the district court of the United States for the southern district of New York, made the twenty-sixth day of October, 1858, in a certain wherein Elisha Baker is libellant, against the ship Potomac, her tackle, &c:

And whereas the claimants of said vessel have paid into the registry of the circuit court of the United States, where such appeal is pending, the sum of four thousand five hundred and fifty-two dollars, pursuant to the order of the court:

And whereas, on the tenth day of May, 1859, an order was made that the libellant have leave to draw from the registry of the court the money paid or to be paid into court herein, in pursuance of the order of the court made May 10th, on the said libellant giving bond with sufficient sureties to obey the orders of the court herein, and repay and refund said sum, or such part thereof as may be directed

by the final decree in this cause, in this or any appellate court, in case of reversal of the decree herein: and whereas the libellant has applied to receive from the registry of said circuit court in this cause the sum of

Now, therefore, the stipulators undersigned hereby stipulate to repay and refund said sum, or such part thereof as may be directed by the final decree in said cause, in this or any appellate court, in case of reversal of the said decree.

Witness the hand and seal of said stipulators, this third day of June, A. D. 1859.

RICH'D BAKER, JR., [L. S.]
F. A. CROCKER, [L. S.]

In presence of WM. D. TRACY.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Ferdinand A. Crocker, being duly sworn, says that he resides in, a resident of, the city of Brooklyn, New York State, and is a householder in said State, and is worth the sum of ten thousand dollars, over and above all his just debts and liabilities, and exclusive of property exempt from execution.

F. A. CROCKER.

Sworn to before me this 3d day of June, 1859.

WM. D. JONES,
Notary Public.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Richard Baker, jr., being duly sworn, says, that he is worth the sum of ten thousand dollars, over and above all his just debts and liabilities, and exclusive of property exempt from execution.

RICH'D BAKER, JR.

Sworn to before me this 3d day of June, 1859.

[L. S.] WM. D. JONES,
Notary Public.

The within stipulation, June 3, 1859.

BEEBE, DEAN & DONOHUE.

Endorsed: U. S. circuit court. Elisha Baker vs. the Ship Potomac, &c. Stipulation. Filed June 6, 1859.

U. S. CIRCUIT COURT.

ELISHA BAKER
vs.
THE SHIP POTOMAC.

Received, New York, June 6, 1859, of R. G. White, Esq., clerk

of above court, four thousand five hundred and six $\frac{66}{100}$ dollars in above cause.

$4,506\frac{66}{100}$ BENEDICT BURR & BENEDICT,
Proct. for Libellant.

Endorsed: U. S. circuit court southern district New York. Elisha Baker vs. the Ship Potomac, &c. Filed June 6, 1859.

At a special term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the City Hall, in the city of New York, on Monday, the twenty-sixth day of September, in the year of our Lord one thousand eight hundred and fifty-nine:

Present, the honorable Samuel Nelson, an associate justice of the Supreme Court of the United States—

ELISHA BAKER, libellant and appellee,
vs.
THE SHIP POTOMAC, &c., claimant and appellant.

The appeal from the district court in this case coming on to be heard,

Mr. Benedict reads from the apostles the evidence on the part of the libellant and appellee, and admissions, (folio .)

Mr. Donohue reads from the apostles the evidence on the part of the claimant and appellant, and depositions.

Mr. Benedict argues on part of appellee.

Mr. Donohue " " appellant.

Mr. Benedict is heard in reply.

Cur adv. vult.

U. S. CIRCUIT COURT.

ELISHA BAKER
vs.
THE SHIP POTOMAC.

CITY AND COUNTY OF NEW YORK, *ss:*

Solomon L. Simpson. My business is as clerk; I owned a part of the Potomac; I did at the time the repairs in question were made. (Claimant objects to being examined, as being interested.) I have no interest in this suit; I will not have to pay any part of any recovery herein; am not interested in the defence of this suit pecuniarily in any way; I know Mr. Baker.

Q. At the time the repairs in suit were made, do you or not know whether or not Mr. Baker had a partner in business.

A. He had.

Q. Who was it?

A. Mr. Drew; Capt. Drew I think they called him. I saw Mr. Drew called as a witness in this suit; that is the one I have re-

ferred to as a partner. The vessel at the time the repairs were finished belonged to New York; her owners resided in New York; the repairs were put on in New York.

Q. Before the work was commenced on the vessel, was or not any bargain or agreement made with Mr. Baker or Mr. Drew?

Obj'd to.

A. They were.

Q. What was the bargain?

A. That the job should not exceed $1,000.

Q. Do you or not know whether all the materials pretended to be bought for the vessel were put into the vessel?

Obj'd to.

A. I know they were not.

Q. Did or not the libellant say anything on that subject after the bill was rendered?

A. Yes, sir; when he told Mr. Baker there was not so much stuff in her, he said there was a lot in his yard worth about $350 to come off the bill; which was to come off the bill.

Q. Was there any more work done on the vessel than what was stated at the time the $1,000 was spoken of?

A. Yes, sir; a new stern post, rudder spliced with new piece, two sticks of timber on the bow; there was a gang plank, side skids, and some little work to the bulwark, and some few spars; may be some others.

I received a written estimate for the work from ; it is mislaid; have looked all over for it.

Q. What was the estimate? (Obj'd to.)

A. $1,000.

Q. Were you about the vessel while the work was being done?

A. I was, more or less.

Q. How was it as to any boys being engaged about the work? what proportion to men?

A. I saw eight or nine boys there to work when I went there.

Cross-examined.

When the Potomac was bought, she was bought by the firm of L. H. Simpson & Sons; that was the name of firm at that time; I mean she was bought for myself and my brother, Lyssack H. Simpson, jr.; Lyssack H. Simpson, jr., bid her off at the auction sale; it was myself and brother's money that paid for her; I can't say where check was given; Lyssack H. Simpson, jr., gave the check to Mr. Stone to pay for her.

It might have been L. H. Simpson & Sons' check, but I can't say positively; I can't recollect in whose name the first bill of sale after the auction was taken.

I was then one of the firm of L. H. Simpson & Sons; that firm was composed of Lyssack H. Simpson, my father, Lyssac H. Simp-

son, jr., my brother, and myself; no other person was interested in it.

Q. For what business was this vessel bought?

A. For general freighting business; at the time of the purchase my father was about going out of the business; he soon after left the business, and myself and my brother succeeded him, under the firm of Simpson Bros.

We took all the old business of the old firm.

The firm of Simpson Bros. failed, and then my father went into business under his own name for himself, and myself and my brother were his clerks, and we are now his clerks.

I do not know that the decree in this case has been paid; I never heard that it had been paid.

As I understand it, I am to receive no money in this case; I don't know how the case stands.

I do not know when Mr. Drew went into partnership with Baker.

I do not know when he left the partnership.

I know that Mr. Drew said he was a partner; that was the source of my information; Mr. Baker told me so, too; I never had any other impression.

Mr. Baker told me that in Sept., '55; I can't recollect the day. It was in my office; Mr. L. H. Simpson, jr., was present; I think Sweeny was present, but am not sure; no one else.

Mr. Baker was soliciting this job; can't say whether it was the first or the second time I saw him about it; he was there several times; the first time he spoke about it, he said he thought of going down east, and if we should conclude to give it to him, Mr. Drew, who was his partner, would attend to it; he was then speaking to both myself and my brother; we were both sitting there in our small private office; that is all he said at that time; that was, perhaps, two, three, or four days, or a week before we gave him the job.

My brother was present during all that interview; I am willing to swear that I have given the words Mr. Baker used at the time.

It was at our office that the $1,000 was spoken of; first it was spoken of at the ship, and then at our office it was concluded; it was concluded at our office the day before Baker went to work.

L. H. Simpson, jr., and myself, Mr. Baker, were the only ones present at that interview.

I won't be positive it was the day before the work was commenced.

Baker said all he wanted was the job to pay him one shilling a day for his men, and $2 50 per day for himself; $2 50 per day for a foreman and $1,000 would enable him to earn that, and he was willing to take the job for that.

Baker said this at the ship; at the head of the ship on the dock; Sweeny was present then; no one else; it was between ten and

two o'clock; can't say on what day it was; it was latter end of September; this was the only time I was up there that day; I think I had been through the ship before that day with Baker and Sweeny; I came down to the office after that conversation at once.

Mr. Baker was paid $500 on account of the work; we have also paid the blacksmith's bill; I gave him the $500 myself; not sure.

The vessel was intended for general freighting business, and went soon after on a voyage to Australia.

The owners of her were irresponsible; our family are Jews.

SOLOMON L. SIMPSON.

Re-direct.

I got a written estimate from Mr. Simpson I have mislaid; put it away with , and cannot find; have made search for it.

SOLOMON L. SIMPSON.

Sworn to before me this 14th day of Sept., 1859.

[L. S.] WM. D. JONES, *Notary Public.*

SOUTHERN DISTRICT OF NEW YORK, *ss*:

Patrick McGinness, of said district. My business is shipwright, caulker, and spar-maker; I saw the Potomac at the time Capt. Baker was doing the work; I saw what work was done on her; I estimated it at $1,700; that would include a profit of about $200 *profit;* I calculated things at outside prices; I know Capt. Drew. (Objected to.)

Do you know what his connection with Capt. Baker?

I know one time he was a clerk, and then represented himself as a partner; the vessel belonged to Mr. Simpson, when the work was being done on her; Mr. Simpson lived in New York; the vessel belonged here at that time.

Cross-examined.

Q. Where was the ship when you saw her as you speak of?

A. She was lying in the East river then; she lay opposite my place; I was on board of her after the work was done; no one was with me; she lay in the North river then; I went round to see how she looked after she was painted up; that was the only time I was on board of her after the work was done. I mean Mr. Sol. Simpson, when I speak of the ownership of the vessel. I have been employed by the Messrs. Simpson. I made the estimate before the work was begun; it was in writing; I gave it to Mr. Solomon Simpson.

P. McGINNESS.

Sworn to before me this 14th day of September, 1859.

[L. S.] WM. D. JONES,
Notary Public.

U. S. CIRCUIT COURT.

ELISHA BAKER
vs.
THE SHIP POTOMAC.

It is admitted herein, that no resort can now be had to the local courts of the State of New York to enforce the local law of that State, which gave the libellant a lien upon said ship at the time the libel herein was filed.

Ap'l 1, 1859.

BEEBE, DEAN & DONOHUE,
Pr. for Claimant.

Endorsed: U. S. circuit court. Elisha Baker v. the Ship Potomac. Co. admission. Rec'd in evidence on the hearing in the circuit court. Benedict, Burr & Benedict, prs. for lib't.

U. S. CIRCUIT COURT.

ELISHA BAKER
vs.
THE SHIP POTOMAC.

It is admitted in this cause, that the ship Potomac was a ship of over five hundred tons burthen; that previous to the time in the libel mentioned, she arrived in the port of New York from a port in a foreign country; and that soon after the repairs in question were made, she sailed from New York for Australia; that at the time she was being repaired, she was not engaged in any voyage, and not chartered for any.

BEEBE, DEAN & DONOHUE.

Endorsed: U. S. circuit court. Elisha Baker v. the Ship Potomac. Co. (2d) admission. Read in evidence on the hearing in the circuit court. Benedict, Burr & Benedict, proct. for lib't.

At a special term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the City Hall, in the city of New York, on Monday, the tenth day of October, in the year of our Lord one thousand eight hundred and fifty-nine:

Present, the honorable Samuel Nelson, an Associate Justice of the Supreme Court of the United States—

ELISHA BAKER, libellant and appellant,
vs.
THE SHIP POTOMAC, her tackle, &c.,
claimant and appellee.

This cause coming on to be heard upon appeal from the district

court of the United States for the southern district of New York, and having been argued by advocates for respective parties, and due deliberation having been therein had, it is now ordered, adjudged, and decreed, that the decree of the said district court made in this cause the twenty-sixth day of October, 1858, be and the same is in all things affirmed; and, on motion of Benedict, Burr & Benedict, it is hereby decreed that the libellant, Elisha Baker, recover herein of the ship Potomac, her tackle, apparel, &c., the sum of four thousand and forty-nine dollars and sixty-seven cents, together with the sum of three hundred and sixty-six dollars and forty cents, the costs of the district court, and the sum of three hundred and nine dollars and twelve cents, being interest from the date of said decree, amounting in all to the sum of four thousand seven hundred and twenty-five dollars and thirteen cents, together with the costs of this court to be taxed.

And, on like motion, it is hereby ordered, that a summary judgment be entered upon the stipulation given herein in favor of the said Elisha Baker against Lissack H. Simpson, principal, and Patrick McGinness, J. Jacobs, and John C. Conner, for the sum of eight thousand and five hundred dollars, the amount of their said bond. And it appearing, by the record of this court, that the said claimant, on the 31st day of May, 1859, pursuant to the order of this court, paid into the registry of this court the sum of four thousand five hundred and fifty-two dollars and eighteen cents; and that on the sixth day of June, 1859, pursuant to the order of this court, the libellant received from the registry of this court, of said amount, the sum of four thousand five hundred and six dollars and sixty-six cents;

Now, on like motion, it is ordered, that unless an appeal be taken from this decree within the time prescribed by law, then that said stipulators cause their stipulations to be fulfilled, and that the libellant have execution for the balance of the amount hereby decreed over and above the amount so received by him from the registry of this court, as aforesaid.

To the Honorable the Supreme Court of the United States of America.

The petition of appeal of Lessac H. Simpson, claimant of the ship Potomac, respectfully showeth:

That heretofore, and on or about the day of , 1854, Elisha Baker filed his libel in the district court of the United States for the southern district of New York, claiming that he had a lien on said vessel for repairs furnished to her; that thereafter an answer was duly filed, taking issue on such libel; and the cause was duly heard in said district court, by a decree thereof, on the day of , 1858; the said court adjudged that the libellant recover against the said vessel and said appellant; that the

claimant duly prosecuted his appeal from said decree to the circuit court of the United States for the southern district of New York, in the second circuit, and the same was duly heard in said court; and that thereafter the said circuit court did order, adjudge, and decree, that said decree of the district should be affirmed, with costs.

That your petitioner respectfully insists that the said decree is erroneous, and he appeals from the said decree, and each and every part thereof, and prays that the Supreme Court of the United States may proceed to hear the said cause anew on new allegations and proofs, and to reverse and annul said decree of the said circuit court, and to restore to the appellant all rights which he has lost by reason of said decree.

LISSAC H. SIMPSON.
BEEBE, DEAN & DONOHUE,
For Appellant.

Endorsed: Supreme Court. Lissac H. Simpson, claimant ship Potomac, appellant, vs. Elisha Baker, respondent. Petition of appeal. Beebe, Dean & Donohue.

We admit service of an appeal, of which the within is a duplicate. Oct. 20, 1859.

BENEDICT, BURR & BENEDICT,
Proctors for Libel't.

Filed Oct. 20, 1859.

SUPREME COURT OF THE UNITED STATES OF AMERICA.

LISSAC H. SIMPSON, claimant of the Ship Potomac, appellant,
vs.
ELISHA BAKER, respondent, appellee.
} Bond for Costs.

Know all men by these presents, that we, Lissac H. Simpson are held and firmly bound unto the above named Elisha Baker, in the sum of one thousand dollars, to be paid to the said Elisha Baker, for the paymentof which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the fifteenth day of October, in the year of our Lord one thousand eight hundred and fifty-nine.

Whereas the above named Lissac H. Simpson has prosecuted his appeal to the Supreme Court of the United States, to reverse the decree rendered in the above entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named Lissac H. Simpson shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his ap-

peal good, then his obligation shall be void; otherwise the same shall be and remain in full force and virtue.

L. H. SIMPSON, [L. S.]
JOHN C. CONNER, [L. S.]

Sealed and delivered, and taken and acknowledged, this 20th day of Oct., 1859, before me.

[L. S.] O. R. STEELE, *Notary Public.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

John C. Conner, being duly sworn, doth depose and say, that he resides in the city of New York; that he is worth the sum of fifteen hundred dollars, over and above all his just debts and liabilities.

JOHN C. CONNER.

Sworn to this 20th day of October, A. D. 1859, before me.

[L. S.] O. R. STEELE,
Notary Public.

[Endorsed:] Vol. , page , U. S. Supreme Court. Lissac H. Simpson, &c., vs. Elisha Baker. Bond for costs on Beebe, Dean & Donohue, proctors. Filed this 21st day of Oct., 1859. Approved Oct. 20th, '59. Chas. A. Ingersoll.

By the honorable C. A. Ingersoll, judge of the circuit court of the United States for the southern district of New York, in the second circuit, to Elisha Baker.

Whereas Lissac H. Simpson has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, made in favor of you, the said Elisha Baker, against the said Lissac H. Simpson, claimant of the ship Potomac, and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the twelfth day of October, in the year of our Lord 1859, and of the independence of the United States the eighty-fourth.

CHAS. A. INGERSOLL.

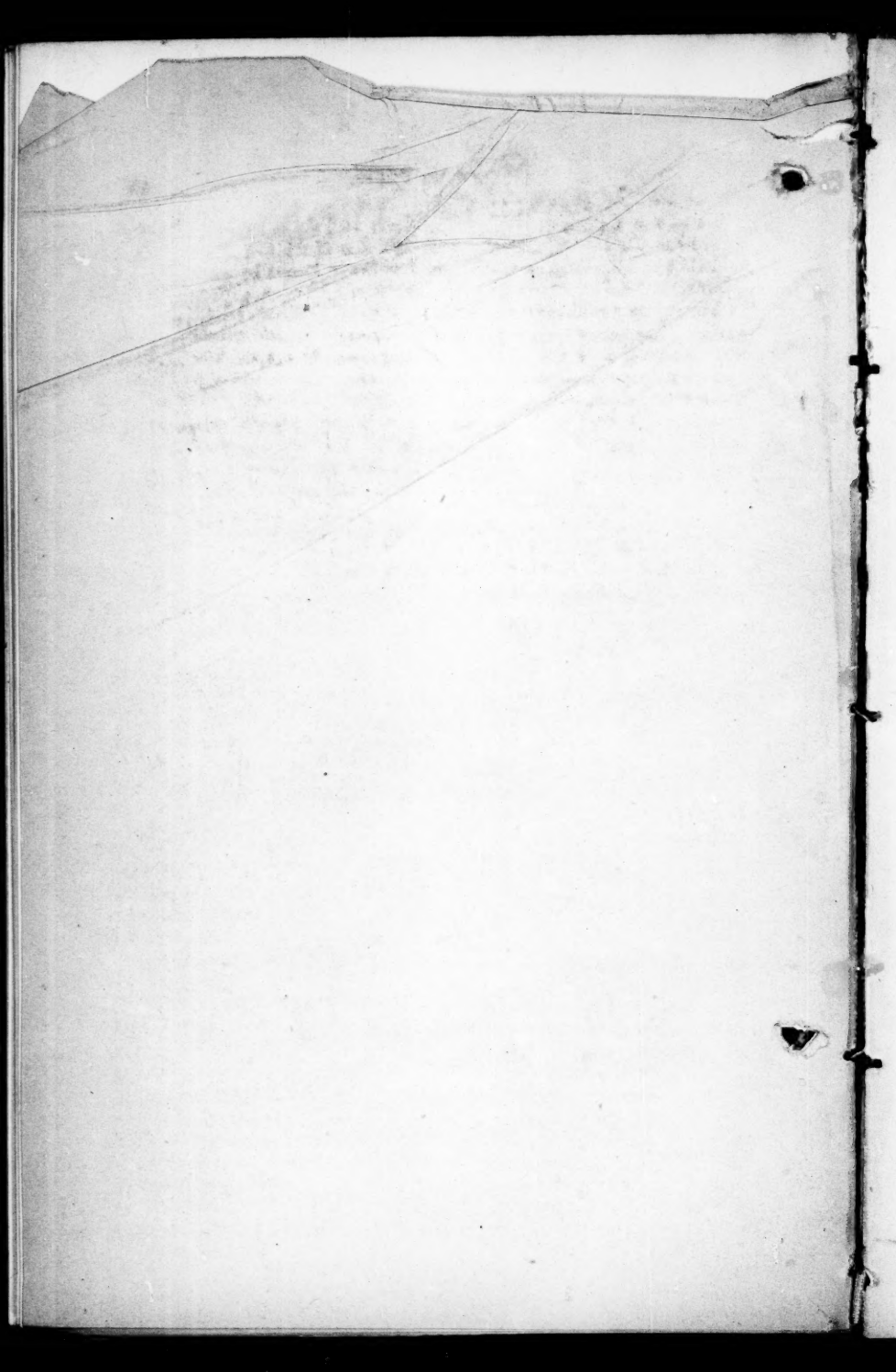
BEEBE, DEAN & DONOHUE,
Proctors for Appellant.

Endorsed: U. S. Supreme Court. Lissac H. Simpson, claimant, &c., vs. Elisha Baker. Citation. Beebe, Dean & Donohue, proctors for appellant.

We admit service of the within citation. Oct. 20, 1859.

BENEDICT, BURR & BENEDICT,
Proctors for Libellant.

Filed Oct. 20, 1859.



Supreme Court of the United States.

DECEMBER TERM, 1862.—No. 38.

LISSAC H. SIMPSON, CLAIMANT OF THE SHIP POTOMAC, APPELLANT,

vs.

ELISHA BAKER, RESPONDENT.

Mr. Gillet's Brief for Appellant.

Appeal from the Circuit Court of the United States, for the Southern District of New York.

1. Baker filed a libel in the District Court, stating a maritime contract, averring that the ship Potomac was in the city of New York, and stood in need of certain repairs, supplies, and carpenter's work, which the libellant furnished at the request of the master, owner, agent, or consignee, which, at the usual and fair rates of compensation, amounted in value to $3,867 99, without which repairs said ship could not safely proceed to sea. Record p. 1.

2. That libellant had a lien upon said ship, for the value of said repairs, which the owners, &c., neglected and refused to pay.

3. He prayed process, and that the ship might be sold to pay his claim. R. p. 2.

4. The ship was seized upon process. R. p. 4.

Claim was made to said ship by appellant. R. p. 5.

5. The usual stipulations for costs were given on both sides. R. pp. 3, 6.

6. The claimant denied, in his answer, the truth of the averments in the libel, but admitted "libellant superintended some work on the said vessel and provided some materials, but not to the amount stated in the libel, and that the same was to be at much lower prices, and was, by the agreement, not to exceed the sum of." R. p. 8.

7. The cause was tried in said District Court, and a decree entered, 26th October, 1858, against the ship for $3,996 18, with interest thereon from the 17th of August, 1858, amounting in all to $4,049 67, with costs to be taxed; and judgment was also entered on claimant's bond. R. p. 41.

8. An appeal was taken to the Circuit Court. R. p. 43.

9. The decree of the District Court was affirmed by the Circuit and appeal taken to the Supreme Court. R. pp. 53, 54.

Evidence was given on both sides in relation to the amount of damages to which the libellant was entitled, both in the District and Circuit Court.

MATERIAL FACTS ESTABLISHED BY THE EVIDENCE IN THE RECORD.

FIRST. *That the demand, in this case, if any exists, is one in favor of the libellant and a partner, and not one in his favor, individually, as averred in the libel.*

The libel avers that the libellant was employed, performed the services, furnished materials, and has a claim against the ship, which is a lien thereon, for the payment of which he prays the ship may be sold. Averments 2, 3, 4, R. p. 1.

These averments are each separately and distinctly denied. Answer 2, 34. R. p. 8.

The following evidence conclusively shows, that a person not joined as a libellant was a partner in the transaction, and should have been made a party libellant.

Sweeny's Ev., R. p. 28. "Baker did say something to me about Drew's being a partner. He said he was a partner."

On his cross-examination he said: "I mean to say that the words used by me above, were the words Baker used; in the first place, he told me anything I done with Mr. Drew, was the same as though I done it with him; I mean to swear, that Baker stated that Drew was a partner; he first told me that Drew was a partner some two months previous to his having anything to do with the Potomac; that might have been on the side-walk, in his yard, or in front of the office; I can't recollect exactly where it was; Baker used the word partner after his return from the East, when I saw him the first time and had the conversation on the bulkhead."

Record p. 17. Q. "Who first applied to you for the job? A. Mr. Drew. It was mainly through Mr. Drew that Mr. Baker got the job. Q. What did Drew say when he came to get the job? A. As to say word for word what he said, I can't do it; but the amount of it was, that he solicited the job as a partner of Mr. Baker. Mr. Baker, I understood was out of town,

and I understood Mr. Drew had the power to act as Mr. Baker. Q. What did Baker say about the partnership with Drew, if anything, or his interest? I can't give what he said; but the impression formed on my mind, from what Baker said, was, that Drew was interested in the concern."

Solomon L. Simpson's Ev., p. 49. Q. At the time the repairs in suit were made, do you, or not, know whether or not Mr. Baker had a partner in business?

A. He had.

Q. Who was it?

A. Mr. Drew; Capt. Drew, I think they called him. I saw Mr. Drew called as a witness in this suit; that is the one I have referred to as a partner.

On his cross-examination (p. 51) he said: "I do not know when Mr. Drew went into partnership with Baker; I do not know when he left the partnership. I know that Mr. Drew said he was a partner; that was the source of my information.

The Accounts. Record, p. 35.

The account made out and presented, states thus:

"Ship Potomac & Owners, To E. Baker *& Co.*, shipwrights & calkers, Dr." At page 36, it is thus:

"Ship Potomac & Owners, To E. Baker *& Co.*, Dr."

Baker rendered the bill himself to Simpson.—*Sweeny's Ev.*, R. p. 18.

"I never saw any of the items, or the bill for it, until I saw it in Simpson's office, and I think Baker brought it there."

McGinniss' Ev. (R. p. 52.) "Do you know what his (Drew's) connection with Baker (was)? I know one time he was a clerk, and then represented himself a partner."

But the understanding of both parties, on this point, is shown by the check given by the Simpsons, and endorsement. The check was admitted by the parties, (R. p. 17,) and is as follows:

"NEW YORK, *October* 27, 1855.

"Saint Nicholas Bank, pay E. Baker & Co., or order, five hundred dollars. "L. H. SIMPSON & SONS.

"Endorsed: E. BAKER & Co. ELISHA BAKER."

Hence, it appears, in contracting, it was with Baker and a partner; the bill was made out and presented by Baker, in the name of himself and partner; the payment was by check in favor of Baker and a partner, and was endorsed by him and a partner. This evidence is undisputed by contrary evidence.

The libellant swore Drew, who was at the time his partner, but made no inquiry of him upon this point. If he was not a partner, why did he not ask him the question? He was not called on to rebut the evidence of Sweeny and Simpson, or to explain why the bills were made out in the name of E. Baker & Co., or why the check and endorsement were in their names, and not in that of Baker alone. It is proved by two unimpeached witnesses, that, on different occasions, both Drew and Baker said they were partners. Both confirmed this evidence by making the charges in the books, by the rendition of the accounts in the name of E. Baker & Co., and in receiving payment in their names.

But this view is rendered conclusive by the libellant's own witnesses.

Norris' Ev., (R., p. 10,) who was foreman in the yard, says: "I did not purchase the materials in the bill. Baker & Co. purchased materials of William Smith & Son—oak and pine—and some they had in the yard which they used on the Potomac."

Roxby's Ev., (R. p. 11.) He says: "I am book-keeper for Baker & Co.; I was with them when it was McPherson & Baker; I know Edward Drew; I know his handwriting; he was a clerk for McPherson & Baker a short time, and was for Baker & Co. since, in September, 1855; I recognize Drew's handwriting in the scrap-book here presented in every line. At this time I was clerk the next door, and don't think Baker & Co. had any other clerk; if they had any one else, I think I should have known it; Drew is sick."

Botefuhr's Ev., (R. p. 29,) for claimant. "I estimated for the work that Baker & Co. did on her."

Although this latter evidence does not show that Drew was, or was not, Baker's partner, it is, of itself, conclusive that he had once been engaged with him in business, and that the materials, in part at least, and probably all, used in repairing the Potomac, were bought in the name of himself and partner. Even the book-keeper, who is now with them, and was then a clerk in the adjoining building, understood that the business belonged to a firm called Baker & Co.

If it were not true that Baker had a partner in this business, it was easy for the libellant to call Drew and other witnesses to disprove or explain away what had been attested to by Sweeny, Simpson, Norris & Roxby, and Botefuhr, and confirmed by the account rendered, and the check and endorsement. But he made no effort to do this, although all this evidence stood undisputed on the record before the hearing in the Circuit Court. He had the opportunity of disproof and explanation, but made no effort

to do either. Hence, we say that this question of fact is conclusively settled against the libellant.

He states in his libel that there was a "contract," and that it was made with, and performed by, *him*. The proof is conclusive that this averment is not true, and he must therefore fail in the claim he makes.

SECOND. *The repairs on the Potomac were undertaken and performed under a special contract, which limited the amount to be paid to the sum of* $1,000, *excluding extras.*

The libel states, that at the "usual and fair rates of compensation" for the work, labor, and materials necessary for making said repairs, the job came to $3,867.99. It amounts to an averment of a *quantum meruit*. The averment (No. 2) in which this statement is found, is distinctly denied in the answer. The special contract was distinctly set up in these words:

"*Fourth.* The respondents further answering, say, that the libellant superintended some work on said vessel, and provided some materials, but not to the amount stated in the libel; and that the same was to be at much lower prices, and was, by agreement, not to exceed the sum of ———."

The question whether the repairs were to be paid for as a *quantum meruit*, or under an agreement limiting the same to a specified sum, was expressly raised.

The claimant introduced the following evidence having a bearing upon this question:

1. *The claimant sought estimates before letting the work.*

Botefuhr's Ev., (R. p. 29:) Said he was a shipwright, calker, and sparmaker, and added—"I know the ship Potomac; I estimated for the work that Baker & Co. done on her; I examined the work to be done before I estimated; the work done, in my judgment, I valued at $1,050, or thereabouts."

Sweeny's Ev. (R. p. 17.)—"Mr. Botefuhr made an estimate for this work."

Simpson's Ev. (R. p. 50.)—I received a written estimate for the work from ——— ———; it is mislaid; have looked all over for it.

Q. What was the estimate? A. $1,000.

McGinniss' Ev., (R. p. 52.) "I made the estimate before the work was begun; it was in writing; I gave it to Mr. Solomon Simpson."

Mr. Baker told me so too; I never had any other impression. Mr. Baker told me that in September '55. I can't recollect the pay; it was in my office; Mr. L. H. Simpson, Jr., was present; I think Sweeny was present, but I am not sure; no one else.

Mr. Baker was soliciting the job; can't say whether it was the first or second time I saw him about it; he was there several times; the first time he spoke about it, he said he thought of going down East, and if we should conclude to give it to him, Mr. Drew, who was his partner, would attend to it; he was then speaking to both myself and my brother; we were both sitting in our small private office; that is all he said at that time; that was perhaps two, three, or four days, or a week, before we gave him the job. My brother was present during all that interview; I am willing to swear that I have given the words Mr. Baker used at the time."

From this it appears that the Simpsons sought to have the work done by the job, so as to make their liability certain before the work began. It was natural that they selected as low an estimate as was offered. There was none lower than Baker's, though one was higher.

2. *The job was taken for* $1,000.

Solomon L. Simpson's Ev., (R. p. 50.) Q. "What was the bargain?"

A. "That the job should not exceed $1,000."

R., p. 51. "It was at our office that the $1,000 was spoken of; first it was spoken of at the ship, and then at our office it was concluded; it was concluded at our office the day before Barker went to work. L. H. Simpson, Jr., and myself and Barker were the only ones present at that interview. I won't be positive it was the day before the work was commenced. Baker said all he wanted was the job to pay him one shilling a day for his men and $2.50 per day for himself, and $2.50 per day for a foreman, and $1,000 would enable him to earn that, and he was willing to take the job for that.

"Baker said this at the ship; at the head of the ship on the dock; Sweeny was present then, and no one else; it was between ten and two o'clock."

Sweeny's Ev., (R. p. 20.) "Mr. Baker stated that he wanted nothing extra out of the job more than one shilling extra for the men, $2 50 per day for himself, and the usual wages for foreman; we then, during this conversation, had a conversation about purchasing the materials; I had an idea of purchasing the material myself. Baker persuaded me that he was better posted in purchasing material than myself. I agreed then with him that he should buy the material, we paying him the cost of the material—he to present his bills to Mr. Simpson. I then wanted to know what the job would probably cost, including material and labor. Baker's answer to me was, in the neighborhood or vicin-

ity of about $1,000. I then informed Baker that other persons had estimated for the job, but with the conversation I had with him, that there was no doubt about his having the job; those were my words to him; in fact I told Baker he might get ready to go to work at it; all that was necessary to make the job positive, was for me to see Mr. Simpson and give him a statement of the conversation with him."

R. p. 21.—"When I saw Mr. Simpson (Solomon) he wanted to see Mr. Baker; he wanted to have an understanding about the agreements I have been making, and see whether they were *satisfaction.* Baker came where we were standing at the bulkhead. The conversation then occurred between Baker, Solomon Simpson, and myself—the conversation I referred to the other day on my direct examination. Mr. Simpson, to the best of my knowledge, began the conversation by wishing to know from Baker what this job was likely to cost. Baker answered Simpson to make his mind easy; that the job should not cost over $1,000; that is the amount of the conversation; that is what the conversation led to. I am willing to swear that Baker used those words, that the job should not cost over $1,000. I heard nothing more than during this conversation Simpson said he felt contented under those conversations, and that he might go on with the work; he might not have said contented, but willing, which is the same thing. Solomon Simpson was one of the owners of the ship."

R. p. 28.—"Then stated the conversation as to what he would do the job for; he then said he would do the work for the price I have before stated."

This evidence is uncontradicted. There is no witness testifying to a contradictory statement, or to any thing to raise a suspicion as to the truth of these statements. It cannot be questioned that a special contract was made, which was binding upon the party doing the job.

Baker first talks with Sweeny and learns that there were estimates and competition, and he then conversed with Sweeny and Simpson together on the same subject; and then goes to the office of the Messrs. Simpsons and concludes the arrangement. The whole course of the matter, in conducting the negotiation and in concluding the arrangement, limiting the compensation, is natural and consistent with the relative position of the parties. The Simpsons were unwilling to conclude an arrangement without knowing what it would cost. They knew it could be done by Botefuhr at $1,050, and they would not be likely to pay more. The proof is, that Baker offered to do it for $50 less, and hence he was preferred in the giving out the job. Hence, we assume that the job, without the extras, was fixed at $1,000, of which

$500 was paid, having but $500 and the extras to be paid for, which is all that the libellant can honestly and legally claim. What these extras amount to, we must gather from the record.

If there was no special contract, why did not the libellant enquire of Drew about the matter, and call out what he understood the arrangement was?

THIRD. *To the* $1,000 *should be added for extra work* $4,000, *its actual value, and no more.*

The cost of the original job having been fixed by the parties cannot be changed, and must stand at $1,000. The value of the extras beyond the job agreed upon must be ascertained from the testimony in the record. We must place reliance upon the witnesses who had the best opportunity to know what the original job was, and the extent and value of the extra work. The opportunities of Botefuhr for understanding these matters were superior to that of any other person.

Botefuhr's Ev., (R., p. 29.) He says: "I examined the work before I estimated; the work done, in my judgment, I valued at $1,050, or thereabouts. I would say that was the fair value of the work. I saw the vessel laying in front of Baker's place just before she was hauled out; all the work was done except the painting, and part of it was primed and part not; there was some repairs done to the rudder after I made the estimate.

Q. Was there more work done, when you examined, after the work was done, than you were willing to have done for $1,050?

A. There was more than I would have been willing to do for $1,050; there was repair on rudder and some repairs on bulkward, for which I would have brought in an extra bill; I should presume $150 would have been a good price. We knew Mr. Baker as a shipmaster, but don't know him as a practical ship-carpenter."

R., p. 30. "There was no work done on the vessel except the stern-post, rudder, bulkwarks and spars, but what was included in the $1,050, except there might have been a few timbers put in; $400 would do all this work with rudder, bulkwarks, stern-post and spars, and leave a good margin for profit, that would include the books, with carpenters and joinors, and all work done on the stern-post, bulkwarks, spars and rudder."

This evidence fixes all the extras at $400, which, added to the $1,050, makes $1,450, as the gross amount of the value of the work, and for which he would have done it.

According to this witness, assuming the contract to have been $1,000, the sum of $400 should be added for extras, making in

all $1,400, out of which the $500 paid should be deducted, and would leave only $900 due.

McGinniss' Ev., (R., p. 52.) "My business is shipwright, calker, and spar-maker; I saw the Potomac at the time Capt. Baker was doing the work; I saw what work was done on her; I estimated it at $1,700; that would include a profit of about $200; I calculated things at outside prices."

Botefuhr and McGinniss are the only witnesses who made estimates of the work, said and knew what was done after it was completed. If McGinniss is correct, the whole job was worth $1,700, from which deduct the $1,000 agreed upon, if his estimate which he put in when he offered to do the work was $1,000, it would leave $700 for extras, being $300 more than Botefuhr's estimate. If he is correct, it would leave $1,200 unpaid.

If the valuations of these two witnessess are averaged, it would give $1,550, of which $500 has been paid, leaving $1,050 due.

It is remarkable that the libellant does not attempt to show, by direct evidence, the value of his work and materials actually devoted and applied in this job. He seeks to make the claimant responsible for what he does not prove the real value of. He does not show what he *actually* paid for labor—some of which was done for him by the job—or materials, but leaves the whole to be inferred from entries which are not proved to be correct. The prices of some of the materials used are proved to be too high and overcharged. There was no effort to overcome the proof that he charged for boys as if they were journeymen. Such evidence, on a quantum meruit, cannot overcome that which is positive. If Botefuhr and McGinniss had underestimated the job, the libellant could have called his numerous workmen, and others who looked on, and have overcome their statement. His not doing so, raises the presumption that he could not gainsay what they had attested to. It follows that we must rely upon their evidence to enable us to arrive at a correct conclusion. Hence we must reduce the amount decreed to the sum actually proved to be all that is justly due, which will be seven or twelve hundred dollars.

FOURTH. *The job was not well done, but the work proved defective.*

It was obligatory upon the jobber to do his work well. This, it is proved in this case, he did not do.

Sweeny's Ev., (R. p. 27.) "I mean to say in my direct examination, that where the work was done it had the appearance of being well done; the appearance was given to it, that it looked

well, until it went into the water, and then it was evident that it was not well done."

Re-cross-examined.

"I mean that it was evident when she began to get her ballast in, because the water began to come in, the putty began to fall out; this was probably three weeks or a month before she went to sea."

FIFTH. *If the account rendered is taken as the basis of the value, the claimant is entitled, among other things, to a deduction for materials retained by Baker, not shown to have been restored to him, nor credited in his account rendered, proved by his confession to be* $350.

The libellant has charged for materials which he professes to have purchased for making the repairs in question. As far as these were not used, their value should be deducted, if the charges for their cost is allowed. The libellant has furnished his estimate of the value of these materials.

S. L. Simpson's Ev. (R. p. 50.) "Q. Do you know whether all the materials pretended to be bought for the vessel were put into the vessel?

A. I know they were not.

Q. Did or did not the libellant say anything on that subject after the bill was rendered?

A. Yes, sir; he said there was a lot in his yard worth about $350 to come off the bill."

This amount he should have deducted from his account before its rendition, but was not, although he said this amount was "to come out of the bill." Of course, this was in addition to the trifling items he had credited on the accounts rendered.

The libellant has not attempted to repel this evidence with counter proof. It must be taken as true, as it unquestionably is. With his partner, Drew, his bookkeeper, Roxby, his foreman, Norris, and his small army of laborers, he has called no one to gainsay the evidence of Simpson, or to show that there was not left in the yard at least the amount of materials that he confessed was there.

It follows, if this claim is to be adjusted upon the principle of allowing his charges for materials purchased, this sum must be deducted.

SIXTH. *The account rendered is too erroneous to be relied upon to establish a quantum meruit against the positive evidence of the contract and of the real value of the repairs made.*

The libellant, assuming that there was no special contract limiting the price of the repairs, seeks under a quantum meruit to

recover what he reasonably ought to receive. This, upon this point, forms the issue. The libellant says he ought to receive the amount charged in his bill. The claimant says that bill is erroneous, is too large, and is more than the job was reasonably worth, and that competent witnesses have proved that a far less sum is all that the repairs really cost.

There is no vice or defect in the claimant's proof as to the real value of the repairs.

On the other hand, their are numerous objectionable things connected with the account presented by the libellant which show it wholly unsafe to rely upon it as a guide to the true amount due.

1. *No bills for the purchase of materials are presented, nor is the quantity used or value established by any certain and reliable evidence.*

All this depends upon what is uncertain. If the foreman entered the materials right, and the clerk understood his entries and took them off right, and then entered them correctly, then the *quantity* might be right. But this would not prove that the *prices* were right.

2. *The amount of labor employed on the job is not proved with reasonable certainty.*

The number of day's work is not proved to be correct. There is no certainty as to the number, as the whole is made, in this respect, to depend upon the accuracy of the foreman's entries or reports, their being understood correclty by the clerk, and his accuracy in making new entries. These entries are not proved to have been compared, nor shown to have been correctly entered. Even the most able and accurate accountants make mistakes, and often large ones, not corrected without infinite patient labor.

The libellant, in his agreement, limited himself, in profits upon wages of others, to a shilling a day. That was all he desired to make. But there is no proof of how much he actually paid the men he employed on this job. He charges two dollars and a half per day, but wholly omits to prove what he paid. This charge is what, in making the contract, he fixed upon as the value of his foreman's and his own services. (R. p. 51, 18.) He does not show how much he is really entitled to per day for the labor bestowed upon the job. The court cannot know what he paid.

3. *A portion of the laborers employed by libellant on the job were boys.*

Of course mere boys were not entitled to the full wages of a competent journeyman. What portion of the labor charged was performed by boys cannot be ascertained, because the account rendered is silent in relation to the length of time devoted to the work. This is the fault of the libellant. The fact of the employment of boys, by him, he has not attempted to question by competent evidence, while it is clearly proved by the claimant.

Sweeny's Ev., (R., p. 19.) Q. "What were they, journeymen or apprentices?"

A. "Mr. Drew told me they were boys; that is, boys that they paid *three dollars per week*. There *was* nine boys that I know *was* at work on the shop (job;) I don't think they could do man's work; to the best of my knowledge they could not do a man's work."

R., p. 24. On the cross-examination he said: "I know there *was* nine boys to work, because I counted them; I counted them on various occasions when they were at work; I counted them on probably two occasions, probably five—more than once, any way."

Simpson's Ev., (R., p. 50.) Q. "Were you about the vessel while the work was being done?"

A. "I was, more or less."

Q. "How was it as to any boys being engaged about the work?"

A. "I saw eight or nine boys there to work when I went there."

This renders it certain that there were nine boys at work there, and that their real wages, instead of being $2.50 per day, was only $3.00 per week, which the libellant has not attempted to deny by proof.

4. *A part of the materials charged were retained by libellant in the yard.*

Simpson's Ev., (R., p. 50.) Q. "Did you, or not, know whether all the materials pretended to be bought for the vessel were put into the vessel?"

A. "I know they were not."

Q. "Did, or not, the libellant say anything on that subject after the bill was rendered?"

A. "Yes, sir; when he told Baker there was not so much stuff in her, he said there was a lot in his yard worth about $350 to come off the bill; which was to come off the bill."

This confession of the libellant utterly disproves the accuracy of his bill rendered, in which he charged for these materials as purchased and used, when he had not used them. It proves that the pretended account was incorrect. Hence, it cannot lay the foundation of a presumption in favor of the accuracy of the charges made. It proves the libellant's books to have been wholly inaccurate, and that no reliance can be placed upon them, or any account or memorandum resting upon them, or dependent upon their accuracy.

5. *There were less of other materials used than charged in the bill.*

The account (R., p. 36) charges:

Oak—14,669 feet, at 4½, - - -	$600.10
White Pine—236 feet, at 4, - - -	9.44
Hard Pine—6,645 feet, at 4, - -	265.80
Locust tree-nails—5,400 at 4, - - -	216.00
Spikes—1,280 lbs., at 8, - - -	102.40
102 composition spikes, at 25, - - -	25.50

Sweeny's Ev., (R., p. 18.) Q. "Could you, or not, tell from having been there (from your experience) during the work, and examining the vessel afterwards, how much material had been used?"

A. "I could do it; I measured the new work that was put on the vessel; in making the estimate, I allowed one-half for waste; I measured the new work on the outside of the vessel which was on the outside; I measured the pine and oak together; I found by allowing one-half waste, there was of both oak and pine 14,303 feet; there was no such number of tree-nails as is mentioned in the bill; there was thirty-seven hundred and some odd, not thirty-eight [not 5,400]; I counted every tree-nail, and chalked them as I passed them; I might have counted in some that ought not to be; I suppose 4,000 tree-nail wedges were used; it was understood that tree-nails were to be wedged inside and out, and would require two wedges to each tree-nail. I could not find any such quantity of spikes as in the bill; don't know what they could be used for; I think the copper bolts were used; can't tell about the composition spikes; don't know where they were used. It was understood that she was to be iron-spiked; I saw nothing but iron go into her, except in the rudder."

Driscoll's Ev., (R., p. 32,) who put on the oak, says: "The oak was an inferior quality; I suppose it was an inferior quality; pine was about four cents a foot at that time; the oak upon her could be bought for three and a half cents; I have called

persons' attention to the oak at the time it was put on; I called Mr. Norris' attention, and Baker's foreman's, and Mr. Baker's himself." (R., p. 33.) "The plank put on this ship was common oak plank, not as good as usually put on. There were 14 streaks, which would make the number of tree-nails only 3,414, instead of 5,400, as charged. There was 122 tree-nails on a side streak—244 all round."

Botefuhr's Ev., (R., p. 29.) Q. "Was the quantity of material charged in that bill used in the work which you examined in that vessel?"

A. "The quantity of materials charged were not used."

Q. "Give us the articles not used."

A. "The oak plank; there is more tree-nails charged than was drove in that vessel; there is in the neighborhood of over two thousand (more) tree-nails charged than was used; I made 2,200 at the time; I think it was that; there is considerable more oak plank charged than was used; the account in one charge is 14,669; all I could make on her, allowing for waste, was about 8,000; that was allowing waste in cutting."

Q. "Did the 8,000 feet which you found include the oak in the work which you would have done for $1,050?"

A. "Yes, sir. The next charge of any importance is hard pine; as near as I can figure, it is a little over double charged."

This evidence leaves no doubt that the materials were overcharged in the bill, as to quantity, and there is no proof that the prices were paid for them, which is charged.

But the two accounts found in the record contain internal evidence of error.

In the first bill in the record, there is a charge of 44 feet of oak plank, at 4 cents, amounting to $1 76, which in the second is charged at 5 cents, making $2 20.

In the first, 14,669 feet of oak is charged, at 4 cents, making $586 76, which in the second is charged at 4½—carried out at $600 10.

In the first bill, 252 feet of oak for stern post is charged at 4 cents—carried out $10 08; in the second it is charged at 4½ cents, and is carried out at $19 34.

The gross amount of charges in the first is $3,890 75, and in the second, $3,985 79; difference $95 04.

In the first, there is a credit given for 1211 old spikes, &c., 12 punching copper—$19 16, while in the second there is a credit for studding booms, punching metal, old iron spikes, and pine retained of $51 16; on neither is found a credit for the $350 worth of materials confessed to have been retained.

Such discrepancies prove that there is gross error, if nothing

worse, and that those who keep and make out such accounts cannot be relied upon.

6. *The work in the account rendered is overcharged, as to time and price.*

The accounts rendered charge for 843 days' work, at $2 50 per day.

It has already been shown, that nine out of the number of men claimed to have been employed by the libellant, were mere boys. And there is no proof of the value of their wages, except that they worked for $3 per week—that is 50 cents per day. If we add to this the one shilling per day, which was all libellant said he desired to make on the work, it would make the work 62½ cents per day, making $1 87½ over-charge—which on nine boys would make $16 83½ cents over-charge for each day; this would be $101 01 per week, and if the job lasted only 4 weeks, would make an overcharge of $404 04, on the boys' labor alone.

Botefuhr's Ev., (R. p. 30.)—After stating overcharges in relation to other things, adds: "In doing the work, I should have used about 400 days' labor; the $1,050, included the blocks with work and all, carpenter work, calking and material; and all the work, independent of stern posts, rudder, bulwarks, spars; this $1,050 I mean would have included the work I would have done on her top wales from the copper up and the knees, as far as where the plank were taken off and replaced in new; there was no work done on the vessel except the stern post, rudder, bulwarks, and spars, but what was included in the $1,050, except there might have been a few new timbers put in; $400 would do all this work, with rudder, bulwarks, stern post and spars, and leave a good margin for profit; that would include the blocks, with carpenters and joiners, and all work done to the stern post, bulwarks and rudder."

Charging $2 50 per day for boys hired at $3 per week; fifty cents per day cannot be justified, nor approved by a court of justice.

7. *Although the planking of the ship was done by the job, the libellant charges for that work by the day.*

Driscoll's Ev., (R. p. 32.)—He testified that he put on the planking for Barker with his own men; that he kept their time and paid them.

"Q. What was the value of the work put on her? A. I rather think $350. Q. repeated. A. $25 streak for fourteen streaks."

"I suppose there was about $300 wages in her, beside tree-nail wages."

From this it is quite apparent that the libellant let out a part of the work by the job, and, instead of charging what he paid out, or that and a per centage on it, he charged by the day for that very work, as if he had done it himself by day's works. The work done by Driscoll could not have been entered on the slate by Norris and copied by Drew, unless they intended to be dishonest, nor charged by libellant, without the intention of committing a fraud on claimant.

With so much evidence impeaching the correctness of the account presented by libellant, it must be thrown out of view in considering the value of the repairs.

We must resort to the agreement, and to the sum agreed upon for the repairs, and add a sum to cover the extras. The latter are proved by Botefuhr and McGinniss.

If we reject the contract (which seems not possible) we must then resort to the evidence of Driscoll, Botefuhr and McGinniss and Sweeny, to ascertain the real value of the repairs.

In either case, the reasonable amount for the job will not come to one-half of what the libellant charged in the account rendered.

From this evidence, it cannot be doubted that the labor was overcharged, as to the number of days necessary labor, and as to the value of the wages, as charged. The libellant charged for 843 days, amounting to $2,212 88, while Botefuhr offered to find materials and do the whole job for less than half that sum. And, when the extras are added and all the work estimated, he now estimates the whole at $811 88 less than is claimed for the work alone. McGinness fixes the whole, allowing $200 profit, at $512 88 less than libellant claims for labor, without materials, and $1,212 88, more than the libellant contracted to do the whole job for, less the repairing the rudder, &c., estimated not to exceed $400 by a competent witness.

It cannot be reasonably contended, after examining this evidence, that it is safe for any tribunal to trust to the correctness of this account for the quantity or value of labor or materials charged, or for anything else.

8. Inconsistencies and contradictions that render the libellant's evidence as to his account unreliable and unsafe to be trusted.

Norris' Ev., (R., p. 10:) "I was on her (the Potomac) all the time she was being repaired, with the exception of one or two days, when I was absent through sickness. I can't come to the particular items that were done on her; I did know at the time; I *did not keep any account of the work done*, except from day to day, which was handed to the clerk."

R., p. 12: "I have a book in which I did keep the entry of the time of the days' work of men on the Potomac; I have examined the book, and find *about* 560 days' work; I kept *all the days' work* except one day, when I was sick."

The libellant charges for 843 days' work, when, if this witness is correct, it should be only 560.

First the witness swears he did not keep any account, and then he says he did, and produces a book; but the number of days are not given from it, nor does he distinguish between the work done by the day from the work done by the job.

Drew's Ev., (R., p. 14:) "The exhibit A is in my handwriting."

R., p. 16: "I did not put the prices in this bill or paper exhibit A., nor did I put the prices in that bill, or paper exhibit A; I did not make that bill; I did not see the exhibit A before this afternoon."

Here Drew first swears the exhibit to be in his handwriting, and then swears that it was not.

He was asked (p. 14) if the prices in exhibit A were "usual and fair," and says they were. At page 16 he was asked:

Q. "Can you swear that you looked at this bill, A, before you swore that the prices were usual and fair?"

A. "I don't know whether I did or not; I supposed it was the original bill, and answered accordingly."

Such testimony cannot be relied upon for any purpose, nor an account which is thus subject to so many objections.

SEVENTH. *The Potomac was an American ship at her home port, where the libellant and her owners resided, and there is no evidence that the repairs could not have been made without her being made the subject of a lien.*

The libel states that Baker resided in New York, and at the time of the repairs the ship was there. (R., p. 1.)

McGinness' Ev., (R., p. 52:) "The vessel belonged to Mr. Simpson when the work was done on her; Mr. Simpson lived in New York; the vessel belonged here (at New York) at the time."

S. L. Simpson's Ev., (R., p. 50:) "When the Potomac was bought she was bought by the firm of L. H. Simpson & Sons; that was the name of the firm at the time; I mean she was bought for myself and my brother, Lyssack H. Simpson, Jr.; Lyssack H. Simpson, Jr., bid her off at the auction sale: it was myself's and brother's money that paid for her."

"The vessel, at the time the repairs were furnished, belonged to New York; her owners resided in New York; the repairs were put on in New York."

There was no want of credit on the part of the Simpsons, as the following will show:

Simpson's Ev., (R., p. 51.) "Baker was soliciting the job; can't say whether it was the first, or second time, I saw him about it; he was there (in S.'s office) several times."

Sweeny's Ev., (R., p. 20.) "We then, during this conversation, had a conversation about purchasing the materials; I had an idea of purchasing the material myself; Baker persuaded me that he was better posted in purchasing material than myself."

If libellant had doubted the personal responsibility of the Simpsons, he would not have objected to their owners furnishing the materials; nor would he have solicited the job.

Points.

First. *The rules of law, as to parties libellant, are the same in admiralty as at common law, except where they profess to act in a representative capacity, or, on proper application, become parties libellant for cases to be specially assigned to and approved by the court.*

The rule, at the common law, is that those who institute a suit are bound to know who are parties to the contract, and have the right to commence it in their own names; and, if they fail to make their proof conform to the averments in their declaration in this respect, they must be defeated on the trial. This rule is too well and universally known to render it even proper to cite authorities to establish it.

The books on Admiralty furnish no evidence of a different rule in practice. None can be found, it is believed, any where. When the libellants are determined upon the libel is filed, the parties are bound by it until relieved by the court, on an application to amend for cause duly shown. No change of parties in this case has been asked for by the libellant, and no change can now be allowed. The libellant has made himself sole plaintiff. This imposes upon him the obligation to prove that he was the sole party who made and performed the contract sued upon. His proof is that he was not sole plaintiff in this case, but that he had a partner, who was, of course, interested in this claim. It stood in their joint names. Under such circumstances, when another person is interested as contractor and libellant, and proved to be so by himself, the libellant cannot deny that he is a necessary party.

In this case, both the libellant and claimant have proved that *some* person beside libellant had an interest in the claim now prosecuted. When that fact was proved, the duty of explanation

devolved upon the libellant. But he made none; and the presumption is against him, and he has not attempted to remove it by any fact. Nor does he show any law avoiding it. The consequence is that the rules of the common law as they exist, are applicable to the present case so far as parties libellant are concerned. If so, the libellant having shown that he had a partner interested in this claim must be defeated because that partner was not joined in the cause. The rule is:

"The party really entitled to relief should always be made libellant. All persons entitled, on the same state of facts, to participate in the same relief, and no others, should be joined as libellants, whether the suit is in personam or in rem." (Benedict 210, 211.)

In the present case it is conclusively proved that Baker had a partner who was interested with him in the claim now made, and who is not a party libellant, and therefore the libel must be dismissed.

SECOND. *Where an account is taken from books not proved to have been systematically and correctly kept, and where it is proved that the entries are wrong as to quantities and prices, it must be rejected, and the party will be required to make actual and distinct proof of the items of such account.*

Where the account is found upon regularly kept books, and a considerable portion of the items are proved, and the books are produced in evidence and proved by those having accounts in them to be correct, a presumption is raised in favor of the correctness of the charges. But this presumption ceases when the books are not produced, when their general accuracy is not proved, and especially when items are proved to be incorrect or improperly charged. In such cases there is no presumption in favor of the account, but one is raised against it.

In the present case the libellant has failed to prove the circumstances which raise a presumption in his favor, while the claimant has conclusively shown those which turn the presumption against him. Hence he was bound to make strict proof of all the items of his account. This he failed to do. Making entries on slates by one man and copying by another is not the way in which to establish the actual facts.

But if it were, the claimant has proved so many errors in the amounts and prices, both by the differing accounts in the record and by witnesses, as to destroy all confidence in the accuracy and truthfulness of the author of the slate entries, as well as of the man who made those found in the books, which neither swear to be correct as to items and prices.

In relation to the latter, the man who made entries in the book, there is additional reasons for not relying upon and trusting his evidence.

Roxby's Ev., (R., p. 11,) He was libellant's witness, and testified on the 24th of December, 1856, and said of the man who kept the books: "Drew is sick."

Q. "How is he sick?"

A. "He is affected *in his head someway.*"

Q. "Is Drew in a condition to give reliable testimony as to facts?"

A. "I should think not, from what I saw of him three weeks ago."

"I called on him some three weeks ago and was surprised that he did not know me, as I was so well acquainted with him before I left, (nine months before.) I offered him any services I could render him, and he said he was not able to talk to any one."

Lane's Ev., (R., p. 12.) "I am acquainted with Edward Drew; have known him seven years; he has been sick for some time past, about two months; I have sat up with him two or three nights; his mind was a good deal out of order; he wanted to know at one time who was getting out of order; he was out of his mind; I sat up with him several nights. Sometimes he would want to know what was there—he would see something before him; he could not recollect from one day to another anything. When I would go in he would say I hadn't been to see him, when I had been in the night before; it was about two or three weeks since I saw him. I don't know any other facts particularly without my being called on to show that he *is* out of his mind; he did not appear to have any memory."

On his cross-examination he said: "Sometimes he would make motions whilst he was in bed; he is bodily sick, and head too."

This evidence was given by libellant on the 24th and 26th of December, and for the evident purpose of excusing himself for not proving his account by Drew, who he proved to have kept the books. He sought to prove the account by showing it in his books without calling Drew. The claimant then attached the accuracy of libellant's account rendered by the oaths of witnesses. Thereupon, on the 16th of January, after proving him incompetent, the libellant felt called upon to bring Drew upon the witness-stand, incompetent as he had proved him to be.

His testimony carefully read, will prove that the two witnesses who proved him unfit to testify, were correct. But he fails to prove the material points.

Drew's Ev., (R., p. 15.) "The value of locust tree-nails vary

according to length; I can't tell you what was the length of those." "Composition spikes I can't tell you within a cent or two; I dont recollect their value. Tree-nail wedges I have forgotten the price of; they are so much a thousand. Copper bolts I can't tell the price of; it is not in my mind now. I do not recollect the size of the spars. *I can't remember the quantity of any of the articles sent from any of the shops or furnished by Mr. Baker.*"

He was asked to state what portion of the bill he recollected to have been furnished the vessel, and answered:

A. "*I can't state the particular quantity of any of the items or the date.*"

(R., p. 16.) "*I cannot give the quantities of any of the materials without referring to the books.*"

This witness wholly failed to fix the quantities of any of the items charged, and but few of the prices, and does not prove that he personally knew the amount of labor bestowed upon the job.

He does not improve the libellant's case. The quantities and prices in the bills remain unproved by competent evidence.

Drew is contradicted in one of his statements. He said, (R., p. 14,) "A copy of the account was furnished to Capt. Sweeny.

Sweeny swears, (R., p. 18,) "I never saw any of the items from the slate copied into the book by Mr. Drew. I never saw any of the items, or the bill for it till I saw it in Simpson s office, and I think Baker brought it there. Drew never delivered a bill to me. I asked Drew for a bill previous to going to Simpson's."

The evidence of Drew ought to be wholly laid aside in this case, because under his state of mind he was not qualified to testify. He was, in fact, as unfit as the libellant proved him to be, when he sought to prove his account by entries made in his books, which were not original entries, nor made by one who knew what he entered to be true.

THIRD. *The contract created no lien on the ship, and the admiralty law created none which can be enforced by the court.*

1. The libel does not aver that an express lien was created by the agreement of the owners or master. There is no proof of any such contract, and nor any such proved, consequently none can be now considered by this suit.

2. The libel does not aver that by the laws of New York, or any local law, a lien had been created; and, therefore, no such lien can be set up and enforced, even if it were within the jurisdiction to enforce liens arising under and existing only by virtue of the local laws of the State.

These grounds of claim—special lien under a contract, or arising under the State law—being excluded by the act of the libellant in presenting his claim, but one ground remains for him to stand upon. This he has specified in the libel in these words: "That this is an action founded upon *contract, civil and maritime.*" Hence, the claim rests exclusively upon the ground, that a contract to repair, is a "maritime contract," and one giving a lien upon the ship repaired, and one that the United States courts have the power and jurisdiction to enforce in admiralty.

This is the ground selected by the libellant to stand upon. It is his only ground, and if this does not sustain him, he must fail.

1. The Constitution (Art. 3) confers upon the Federal courts power to hear "all cases of admiralty and maritime jurisdiction."

Congress has provided, "The district courts shall have exclusive original cognizance of all civil causes of admiralty and marititime jurisdiction." No other provision is made by statute, except as to the western lakes.

A maritime contract is one that relates to services to be rendered at sea. The contract proved is not of this character. The service was rendered at home, where the parties resided, and where the ship belonged. The common law gave the repairer the right to retain possession until the repairs were paid. But such right was not asserted, nor is it now set up, nor would such right of possession be a maritime lien. It would be simply one of common law.

It is conceded, that repairs and supplies furnished in our ports to a foreign ship, creates a lien, under a maritime contract, because she is away from home on a voyage at sea. When such a vessel leaves her home port, she goes to sea, and remains at sea, until she returns. In such case the repairs are necessary for the voyage and to insure the ship's safe return. But this is otherwise when a ship is at her home port where her owners reside, and she is simply being got ready to be employed to go to sea. In such case there is no maritime contract and no lien unless created by contract. This is settled by authority.

The English rule was that there was no lien for repairs and supplies in any case. (Zane vs. Brig President, 4 Wash., 453.) But the rule in the American courts, upon the principle above stated, recognizes a lien on foreign ships.

In the case of the *Robert Fulton* (1 Paine, 620) Thompson, J., said: "Where the claim is against a foreign ship, or a ship in the ports of a State to which she does not belong, the general maritime law gives a lien on the ship which may be enforced in the District Court."

The same rule is laid down in the case of the *General Smith*, (4 Wh., 438.)

In *Gibbon vs. Ogden*, (9 Wh., 204,) the Supreme Court lay down rules in relation to the boundaries of constitutional commercial power, which are wholly inconsistent with the jurisdiction now claimed for a court of admiralty.

In *Peyroux v. Howard and another*, (7 Pet., 324–341) this Court said: "Where the repairs have been made, or necessaries furnished, to a foreign ship, or to a ship in ports of a State to which she does not belong, the general maritime law gives a lien on the ship as security, and the party may maintain a suit in admiralty to support his right. But as to repairs or necessaries in the port of a State to which the ship belongs, the case is governed altogether by the local law of the State, and no lien is implied unless it is recognized by that law. But if the local law gives the lien, it may be enforced in admiralty."

The rule, announced in the latter part of the last sentence, has been since repudiated by this Court, as not law.

In *Bogart v. The John Jay*, (17 How., 399, 402,) this Court refused to entertain jurisdiction to enforce a lien created by the act of the parties, by way of mortgage, because it was not a *maritime* contract, but was "*without reference to navigation, or perils of the sea.*"

In *Pratt v. Reed*, (19 How., 359,) this Court held that it was necessary, in order to sustain a maritime lien for supplies furnished a vessel, the libellant must show that there *was a necessity of procuring the supplies on her credit.*

NELSON, J., said:

"It seems to have been taken for granted, that a supply of coal was essential to the propelling of a steamboat, and, in a general sense, this is undoubtedly true; but then to make out a necessity within the admiralty rule, the supply must be really, or apparently, necessary at the time when it is furnished. But the more serious difficulty in the case, on the part of the libellant, is the entire absence of any proof to show that there was *a necessity, at the time of procuring the supplies, for a credit upon the vessel.* This proof is as essential as that of the necessity of the article itself. The vessel *is not subject to a lien for the common debt of the master or owner.* It is only under very special circumstances, and in an unforeseen and unexpected emergency, that an implied maritime hypothecation can be created.

"Now, the supplies having been furnished at a fixed place, according to the account current, and apparently under some general understanding and arrangement, *the presumption is, that there could be no necessity for the implied hypothecation of the vessel*—there could be no unexpected or unforeseen exigency to

require it. For aught that appears, the supplies could have been procured on the personal credit of the master, and, in this case especially, as he was also the owner."

This was the case of a foreign ship, and the lien was held not to attach, because the libellant made no proof that the master or owner had not credit sufficient to enable him to procure the supplies. In the case at bar, no proof was made on this point by the libellant. His voluntarily giving up the possession of the ship to the claimant, instead of retaining it until he was paid, as he might have done, is conclusive evidence that these repairs were made on the credit of the owners. If a controversy had not arisen concerning the *amount* claimed, a lien upon the ship would not, probably, have been thought of or resorted to. The presumption is, that the owners were able to pay, and he who claims otherwise must prove it, but he has not done so. Hence, there is no pretence for an implied lien.

In *Allen v. Newberry*, (21 How., 244,) this Court proceeded upon the ground that contracts made and to be executed within a State are *not maritime* contracts coming within the jurisdiction of a Court of Admiralty.

NELSON, J., said: "The exclusive jurisdiction in admiralty cases was conferred on the National Government, as closely connected with the grant of commercial power. It is a Maritime Court instituted for the purpose of administering the law of the seas. There seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limit of the grant of the commercial power, which would confine it, in cases of *contracts, to those concerning the navigation and trade of the country upon the high seas, and tide waters, with foreign countries, or among the several States.*"

At the time of the contract in question, the ship was not engaged in any trade, and might never be.

In *Maguire vs. Car* (21 How., 248) the libel was to recover for coal furnished a steamer engaged in trade within the State of California. The court held that such a contract created no maritime lien. They say there is no difference between a contract of affreightment exclusively within a State, and a contract for supplies furnished a vessel engaged in commerce within a State. The court say: "To subject it, (such commerce,) therefore, to the jurisdiction in admiralty, would be exercising this jurisdiction *simply in the enforcement of the municipal laws of the State*, as these laws, under the conceded limitation of the commercial power, regulate the subject as completely as Congress does commerce 'with foreign nations, and among the several States.'"

The court state that they had amended the twelvth admiralty

rule, permitting the enforcement of a State law lien in the Federal courts, and assign this reason therefor: "It being conceded that no such lien exists according to the admiralty law, we have determined to leave all these liens depending upon State laws, and not arising out of the maritime control to be enforced by the State courts."

This is equivalent to saying that where a ship is out of her State, and not at a home port, we will recognize and enforce the implied lien arising under a maritime contract, where the credit was necessarily given her, but those liens which arise under the local laws of the State we will not enforce; and that contracts for repairs in a home port is not a *maritime* contract, and we will not enforce it as such. This is the fair meaning of these decisions, and excludes the present claim.

In the *Steamboat New Orleans vs. Phœbus* (11 Pet., 175, 184) this court refused to enforce a law of Louisiana giving a master a lien for his wages.

FOURTH. *State laws can neither confer nor take away the admiralty jurisdiction of the Federal courts.*

The admiralty jurisdiction exercised by the national courts is derived exclusively from the Federal Constitution, and extends "to all cases of admiralty and maritime jurisdiction." When this instrument was framed there were admiralty courts here and in England, and these words had reference to the classes of cases adjudicated in them. They related to business on the seas, naturally including that of "commerce with foreign nations and among the several States." Where the business was going to or returning from foreign nations, or among the several States, the Constitution contemplated that Congress would so legislate as to confer jurisdiction upon the Federal courts. But it was no more the intention that the several States, by their lien or other laws, should confer jurisdiction or create business for those courts than that they should take it away. The State power is as ample to deprive the Federal courts of their jurisdiction and business as to clothe them with it. They can do neither the one nor the other.

If a State can confer it, then each of the thirty-four can do so. Then the Federal courts would be called upon to exercise thirty-four such jurisdictions as might be conferred, in addition to what Congress might impose, as well as what the old admiralty rules confer. There might be thirty-four different rules of action, and the court in one State would be declaring a rule of law, which was forbidden in another. If a State really has such power, even Congress cannot nullify it. State power

must be as potent to regulate the manner of its exercise, as in the creation of the right itself, which would compel the Federal courts to conform to such course of practice as the State might deem suitable.

In the *Steamer St. Lawrence*, (1 Black., 522,) this Court held that State laws could not confer jurisdiction, nor take it away. Such liens are not maritime liens. The States cannot create a maritime lien. They can only create *legislative or municipal* liens.

Admiralty law is the only law which an admiralty court can enforce. This law alone creates the lien. Mr. JUSTICE NELSON truly said it is "conceded that no such lien (created by State law) exists according to admiralty law." If none exists, there is none to enforce, as no one will pretend that where a lien does not exist, one can be enforced. In this case the contract is described as "maritime," and the lien must also be maritime, if any. But Judge Nelson says it is not a maritime lien, and it follows it is not a maritime contract, and libel must fail.

The cases wherein it has been held that a federal court could enforce a State lien, are not now authority. In *Maguire vs. Card*, (21 How., 252,) NELSON speaks of "correcting an error" which had its origin in them. They were never supported by the Constitution or a law of Congress. This Court has repudiated them as not binding upon it, and of course they do not bind suitors, nor will it *repeat that error* now, when it is known to be wrong and illegal.

The libellant had two modes of protecting himself, without asking a federal court to exercise unconstitutional jurisdiction. He could have held on to the possession of the ship until paid the expense of the repairs under his common law lien. Or, he could have proceeded under the statutes of New York, which provide a special lien and the mode of its execution. Both were open to him. He preferred not to resort to either. He came to a federal court which has no jurisdiction. If he fails to collect what is his due, it is to be attributable solely to himself.

FIFTH. *A rule of court can neither confer nor take away jurisdiction.*

The libellant will probably claim that the old 12th Admiralty Rule conferred jurisdiction and that it will operate upon all cases instituted prior to the first day of May, 1859, when it ceased to exist, and therefore reaches this case. There are two answers to this assumption.

1. The libellant has not set up in his libel any such lien, but expressly claims on a "maritime contract."

Not having claimed under a State lien, he cannot abandon his pretensions under a maritime contract, and resort to one not

maritime—one giving a lien upon ships under certain circum stances and resort to a State lien not mentioned in his pleading. This would be taking the claimant by surprise and would be wrong.

2. The rules made for the Courts of Admiralty neither confer nor take away jurisdiction. The Court neither makes nor repeals laws. There is no law authorizing the Court to make a rule conferring jurisdiction. The 6th section of the Act of 1842, (5 U. S. L., 518,) confers power to make rules prescribing forms and modes of proceeding in the Circuit and District Courts, but nothing more. The Act of 1792, (1 U. S. L., 276, § 2,) had the same object in view, but is not quite as broad.

If the Court can by rule add to the cases of admiralty jurisdiction *in rem*, there can be no limit in its exercise. They can include the enforcement of mortgages, master's wages, and all the questions among part owners. They can extend it to internal commerce in a State, and to cases of damages for imperfect work on a ship, or assaults and batteries committed on board of one. There could be no limit. On the other hand, they might, under the same undescribed source of power, cut down their jurisdiction, and limit and prohibit its exercise in cases heretofore conceded, or enacted, to be within their jurisdiction. Hence, it is insisted, that if the forms of the libel warranted it, the Court cannot exercise jurisdiction under a mere rule, and thus bring a case within its control not permitted by the law of the land. No such effect can be attributed to the rules of the Court. They are neither written nor unwritten law, further than they relate to its practice, or are expressly authorized by an act of Congress, or the Constitution.

The *law* on the first day of May, 1859, was the same as it was in 1855. The law-making power has not changed it. The *practice* of the Courts may have changed. But practice cannot change the *legal rights* of parties in Court nor open or shut the door upon them. The right to deprive an owner of his ship depends upon law, and not upon practice.

In *The Steamer St. Lawrence*, (1 Black., 522,) it was held that a rule of Court could not add to or take away the jurisdiction of the Federal Courts.

If either of the views above presented are correct, the decree must be reversed.

But whether with, or without, instructions, must depend upon the grounds upon which the reversal shall be made.

Dated: 27th *November*, 1862.

R. H. GILLET,
Of Counsel for Appellant.